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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 406

HUGH MILLER MERCER, *et al.*; *Appellants*,

—against—

ARTHUR I. HEMMINGS, *et al.*, *Appellees*.

No.

HERMAN W. BEVIS, *et al.*, *Appellants*,

—against—

MARK W. EASTLAND, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants, the partners of Price Waterhouse & Co. (hereinafter Price Waterhouse), appeal from two judgments of the Supreme Court of Florida. The judgment in *Mercer* v. *Hemmings* affirmed in part a supplemental decree of the Circuit Court for Alachua County which enjoined Price Waterhouse from practicing accountancy in Florida. The judgment in *Bevis* v. *Eastland* affirmed a judgment of the Florida District Court of Appeal, First District, which upheld the action of the Florida State Board of Accountancy

(hereinafter the Board) in denying certificates by reciprocity to certain of appellants. This single jurisdictional statement for both cases on appeal is being filed pursuant to Rule 15(3) of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of Florida in *Mercer* v. *Hemmings* is reported at 194 So. 2d 579 (1966); its prior opinion in the same case is reported at 170 So. 2d 33 (1964). The opinion of the Supreme Court of Florida in *Bevis* v. *Eastland*, affirming the judgment of the District Court of Appeal reported at 186 So. 2d 818 (1966), is reported at 194 So. 2d 587 (1966).* All four opinions are set forth in Appendix A.* The decree and supplemental decree of the Circuit Court in *Mercer* v. *Hemmings* are also set forth in Appendix A.

JURISDICTION

The judgments of the Supreme Court of Florida, affirming the injunction against Price Waterhouse and affirming the denial of certificates by reciprocity, were dated November 23, 1966, and were entered on February 22, 1967. Timely petitions for rehearing were filed in both cases and denied on February 22, 1967. The judgments are set forth in the opinions of the court below and in its orders denying rehearing (Appendix A).

A notice of appeal was filed in each case in the Supreme Court of Florida on May 23, 1967. The jurisdiction of this Court to review these cases on appeal is conferred by 28 U.S.C. §§ 1257(2), 2101(c) (1964). The following deci-

*The Appendices to this Jurisdictional Statement are submitted under separate cover.

sions sustain the jurisdiction of this Court to review on appeal the judgments below: *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

QUESTIONS PRESENTED

1. Whether Chapter 473, Florida Statutes, regulating the practice of accountancy, as implemented by rules and enforcement procedures adopted by an administrative board of local accountants, contravenes the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution when it operates to promote a local monopoly and to prevent the partners of a national accounting firm, with unquestioned professional qualifications and with a record of sixty years of activity in Florida without injury to the public, from continuing to perform necessary accounting services for clients engaged in interstate commerce?

2. Whether Chapter 473, Florida Statutes, contravenes the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution when, having required all partners of a national accounting firm to possess Florida licenses, it confers upon the State Board of Accountancy the discretion to deny licenses to the members of the firm on grounds unrelated to professional qualifications, and thus make it impossible for that firm to perform necessary accounting services in Florida for clients engaged in interstate commerce?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the commerce clause, U. S. Const. art. I, § 8, and the due process, equal protection, and privileges and immunities clauses, U. S. Const. amend. XIV, § 1. The statutory provisions involved are the Florida Accountancy Law (Chapter 473, Florida Statutes) and the Rules of the Florida State Board of Accountancy adopted pursuant thereto. The pertinent provisions are set forth in Appendix B.

STATEMENT

(1) The Parties to the Litigation.

(a) *The Price Waterhouse firm.* Appellants are the partners of the Price Waterhouse firm, a national firm of independent public accountants. The firm has for many years rendered accounting services in all of the states of the United States, including Florida. At present it is comprised of more than 150 partners, each of whom has qualified as a certified public accountant by virtue of an examination in one or more jurisdictions, and it has offices in over thirty states. The firm first performed services in Florida as early as 1906, and its Florida activities in behalf of clients engaged in interstate commerce have grown ever since, particularly in the post-war period along with the tremendous expansion of nationwide businesses into the state. The firm and associated Price Waterhouse firms operate in most other parts of the free world. Their ability to practice freely under the Price Waterhouse name is curtailed only in Egypt, the

Philippines, and Florida (Ex. 11, pp. 4, 18, 21; Ex. 13, p. 10; Ex. 14, p. 7).*

(b) *The Florida Board.* Appellees are the five members of the Board. Each of them holds a certificate as a certified public accountant issued by the Board, as required by F. S. 473.03 (M. R. 412-13, 426). The Board is closely affiliated with and responsive to the views of the local Florida accountants, as is evidenced by the fact that each is in public practice in Florida, and by the fact that the Executive Secretary of the Board also serves as Managing Director of the Florida Institute of Certified Public Accountants (Ex. 15, pp. 12-16).**

(2) The Litigation and Decisions Below.

(a) *Background of the Litigation.* For several decades Price Waterhouse was able to perform the relatively modest volume of services in Florida then required by its interstate clients by sending staff temporarily into Florida. These activities, of a relatively sporadic character, were performed under temporary licenses issued by the Board. By 1960, however, the volume and nature of required Florida work had so expanded that it became necessary for Price Waterhouse to establish a resident staff in Florida. In 1962, the Board responded by adopting a rule prohibiting such practice with a resident staff unless every member of the Price

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*Record references in *Mercer* v. *Hemmings* are preceded by the designation "M. R." except for references to the deposition testimony introduced as exhibits during the trial—transmitted to this Court in the original by the Clerk of the Supreme Court of Florida—which are preceded by the exhibit number of the particular deposition. Record references in *Bevis* v. *Eastland* are preceded by the designation "B. R."

**The Executive Secretary was originally employed by the Institute in order to "merge" the activities of the Board and the Institute. The Secretary maintains a joint office, some of whose personnel are compensated by the Institute and some by the Board. He also performs lobbying services in behalf of the Institute before the Florida legislature (Ex. 15, pp. 12-16).

Waterhouse firm obtained a permanent Florida license. However, the residence and clerkship provisions of the statute and regulations made it impossible for them to obtain such licenses. Appellants promptly commenced this litigation, which has now culminated in the decisions below.

Although the professional competence of Price Waterhouse is unquestioned, these decisions prevent it from performing accounting services in Florida for its interstate clients and require it to turn over its business for those clients to local accountants.

(b) *The Restrictive Statutory Scheme.* Since 1931, the practice of accountancy has been regulated in Florida by Chapter 473 of the Florida Statutes, a statute concededly adopted in order to make it virtually impossible for national firms to practice in Florida other than on a transient basis (Ex. 10, p. 84; Ex. 12, pp. 65-66). The statute requires that any person performing accounting services obtain a certificate (*i.e.*, a license) from the Board, either (a) temporary or (b) permanent by reciprocity or examination. The heart of the restrictive regulatory scheme, however, is contained in F.S. 473.16 and 473.23, which provide in substance that no person may practice accountancy within the state as a member of a firm unless not only he but every one of his partners holds a Florida certificate authorizing such practice.*

Prior to this litigation, the exclusionary purpose of those provisions had been successfully implemented by statutory requirements of two years' prior residence and "clerkship" with a Florida certified public accountant as

*The statute makes it unlawful for a Florida CPA to practice as the representative, agent or manager of anyone not licensed by the Florida Board. F. S. 473.16, 473.23. And the Board has, during the course of this litigation, acted implementing rules which prohibit the formation of the professional relationship of representative, agent or manager whenever the out-of-state accountant exercises any significant control, by way of supervision, financial assistance or otherwise, over the Florida CPA. *See* Rules 20-10.01,.02,.03.

conditions precedent to application for Florida certification by reciprocity (*i.e.*, without re-examination) pursuant to F.S. 473.19, or by examination pursuant to F.S. 473.08. As for certification by examination, F.S. 473.08, effective in 1956 and implemented by Board Rule 20-7.02, prescribes detailed undergraduate course requirements—apparently taken from the current curriculum of the University of Florida—some of which were not even in existence when many of the Price Waterhouse partners were originally certified (in each instance by examination). These undergraduate course requirments must be met before an applicant, no matter how many years of demanding experience he may have had after certification by examination in another state, may even *sit* for the Florida examination.

(c) *Price Waterhouse's Limited Practice Under Temporary Certificates.* As a result of this highly restrictive statutory scheme, the activities of Price Waterhouse were circumscribed in Florida to a degree unmatched by any other state in the Union. The firm was not able to follow the practice utilized in most other states of establishing an office with one or more resident partners, each meeting all local requirements, since F.S. 473.16 and F.S. 473.23 make unlawful any such operation unless all nonresident partners also obtain Florida certification (which they manifestly could not do in view of such requirements as residence and clerkship). The firm was instead relegated to a limited practice under "temporary certificates," which were issued pursuant to F.S. 473.14 for a ninety-day period and permit only performance of a specific engagement entered into outside the state. However, these temporary certificates were subject to issuance only at the discretion of the Board, and it began to resist granting them in 1962, in the circumstances described below.

During the year 1960, appellants' volume of Florida work for interstate clients having grown to substantial proportions, appellants opened a private work space in Miami, staffed by resident personnel, in order to perform the year-round accounting and auditing activity required by their clients' expanding operations there, and another work space was opened in Tampa in 1962. However, appellants carefully avoided any activity giving the appearance of holding themselves out to the Florida public as authorized to practice under Florida law; indeed, the Price Waterhouse name was kept off the doors of the work spaces, and out of the building and telephone directories (Ex. 2, pp. 5, 18, 19, 41, 46-48; Ex. 7, p. 9; Ex. 9, pp. 13-14, 48, 50, 52, 53-54, 57).

(d) *Discontinuance of Temporary Certificates and Institution of Mercer* v. *Hemmings.* The Board learned of the existence of the work spaces in 1962. It immediately passed an "emergency" rule (Rule 20-9.03) prohibiting the issuance of temporary certificates to those maintaining full-time offices and resident personnel in Florida (Ex. 15, pp. 41-42). Appellants promptly instituted the first of these two actions, *Mercer* v. *Hemmings,* in the Circuit Court for Alachua County, asserting that the statute and rule, taken together, as applied to them violated the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution (M. R. 421-22). The Board counterclaimed for an injunction, alleging that appellants were violating the law by their practice without appropriate certification. The circuit court rejected appellants' constitutional claims. It upheld the position of the Board and granted its counterclaim (M. R. 586-87). Appellants appealed to the Supreme Court of Florida (M. R. 599).

(e) *The First Mercer* v. *Hemmings Decision.* The Florida Supreme Court in an opinion filed July 29, 1964, held that, while appellants were subject to regulation by

the Board even though they did not hold themselves out to the Florida public, the new rule limiting temporary certificates could not constitutionally be applied to them in light of the stringency of Chaper 473, which had made it virtually impossible for them to obtain permanent CPA certificates because of residence and clerkship requirements. It further held that permanent certification requirements could not be so "hedged" as to make it "virtually impossible" for nonresidents to comply therewith and that accordingly appellants were entitled to continue to practice in the state under temporary certificates until they had reasonable opportunity to qualify for permanent certificates either by reciprocity or by examination, *"without regard to residence or clerkship requirements"* of the statute (App. A, p. 39a) (emphasis added).

(f) *The Board's Denial of Appellants' Applications for Permanent Certificates.* The apparent elimination by the Florida Supreme Court of such artificial barriers to licensing as residence and clerkship seemed to clear the way for certification of all the Price Waterhouse partners, since their professional competence was unquestioned. Accordingly, all 144 of the then partners promptly filed applications for permanent certificates by reciprocity pursuant to F. S. 473.19 (M. R. 229-31).*

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*The Board's attitude toward appellants and the national accounting firms is also demonstrated by a rule change which the Board adopted during this period. On April 2, 1965, the very day after appellants had filed their applications for reciprocal certificates, the Board amended its Rule 20-9.04, relating to criteria for granting reciprocal certificates (M. R. 252-54). Prior to amendment, the Rule had required an applicant to show that:

> ". . . at the time his original certificate was issued by a state, or political sub-division of the United States, or by a foreign country, he could have met the requirements then in *effect* in the State of Florida for the issuance of a certificate as a Certified Public Accountant. . . ." (Emphasis added.)

This Rule was left untouched with respect to applicants who met the statutory two-year residence and clerkship requirements. As to applicants not meeting those requirements, however (notably repre-

The Board, however, did not give up so easily. Acting in June and July, 1965 on seven of the applications filed, it summarily denied all of them, without a hearing and without adverting to the applicants' professional qualifications. With respect to six of the applications, the Board asserted two grounds of denial, (i) that the applicant had been originally certified by examination in a state which did not extend "similar privileges" to Florida accountants and (ii) notwithstanding the decision in *Mercer* v. *Hemmings* eliminating residence criteria, that the applicant was not a resident of Florida. With respect to one applicant, the Board denied it on the sole ground that the applicant was not a resident of Florida (B. R. 20-21).

(g) *Institution of the Bevis* v. *Eastland Proceeding.* Appellants challenged the action of the Board by bringing the second of these two actions, *Bevis* v. *Eastland.* This action took the form of a petition for certiorari in the District Court of Appeal under the Administrative Procedure Act, F. S. 120.31, contending that the Board action was palpably inconsistent with the prior holding of the Supreme Court of Florida in *Mercer* v. *Hemmings* and in any event inconsistent with the commerce, due process, equal protection and privileges and immunities clauses of the United States Constitution (B. R. 23). The District Court of Appeal upheld the action of the Board, rejecting appellant's constitutional claims (Appendix A, pp. 23a-24a). Appellants sought review of that decision in the Supreme Court of Florida.

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servatives of the national firms), the Rule was amended to provide that:

"... applicant meets the educational requirements of the State of Florida for certification by examination *in effect on the date of the application for certificate by reciprocity.*..."
(Rule 20.04 (2)(b) (emphasis added).

(h) *The Appeal from the Circuit Court's Supplemental Decree in Mercer v. Hemmings.* In addition to instituting *Bevis* v. *Eastland*, appellants were also forced to seek appellate review of the supplemental decree entered by the Circuit Court on remand from the first *Mercer* v. *Hemmings* decision, on the ground that it was inconsistent with that decision. For despite the Florida Supreme Court's determination in that case that the Board's rule denying temporary certificates to appellants could not be constitutionally applied to them, the Circuit Court's supplemental decree found appellants to have violated the law by practicing without any certificates and accordingly sustained the Board's counterclaim for an injunction against their practice in Florida except to the extent the Board might see fit to grant certificates in the future. That injunction was stayed for an indefinite period in order to permit appellants to apply for permanent certificates, as hereinabove described. Appellants in their appeal again contended that the Circuit Court's decision violated the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution (M. R. 116, 137-48).

(i) *The Board's Motion for Vacation of Stay of Injunction.* Prior to final argument and decision in the two appeals before the Supreme Court of Florida, the Board moved in that court to vacate the stay of the Circuit Court's injunction, in order to force the Price Waterhouse firm to get out of the state. In support of its motion, the Board asserted, among other things, that (i) the vast majority of appellants were nonresidents and (ii) some of the older members of Price Waterhouse who had been previously certified in other states many years ago not only were ineligible for certificates by reciprocity by virtue of amended Rule 20-9.04 (*see* note, pp. 9-10 *supra*) but could not even qualify to take the examination under F. S. 473.08. Hence, since Chapter 473 requires that a firm can only practice in

Florida if all of its members are certified (F. S. 473.16, F. S. 473.23) and since the Board itself had already denied a number of appellants' applications for reciprocal certificates, the Board argued that the Price Waterhouse firm could not practice in the state because at least some of its members could never become certified (M. R. 248-67).

(j) *The Decisions Below.* The Supreme Court of Florida in its opinions filed November 23, 1966, rejected appellants' constitutional claims, in essence endorsing the position of the Board and repudiating its 1964 decision in *Mercer* v. *Hemmings*. In contrast with its earlier determination that the Board could not constitutionally deny temporary certificates to appellants by reason of Rule 20-9.03, the court held that Price Waterhouse had only a "privilege," not a right, to work in Florida under temporary certificates, at the discretion of the Board. It further held that, despite its prior opinion that the provisions for permanent certificates by reciprocity could not be unreasonably "hedged," the Board had broad discretion to deny applications for reciprocal certificates if the states of appellants' original certification did not conform to the Board's concept of "similar privileges" for Florida accountants—although, in fact, the states involved do extend such privileges.* *It also held, in square and inexplicable contradiction to its*

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*All of the states involved in *Bevis* v. *Eastland* do provide for reciprocity (R. R. 361-66, 369-74, 377-85, 387-90). Indeed, it is incontestable that New York (and presumably all of the other states involved) have in the past issued reciprocal certificates to Florida accountants (R. R. 174-75). None of these states, moreover, has a provision comparable to the onerous F. S. 473.16. Finally, F. S. 473.19 on its face does not *require* that reciprocal certificates be denied where the state of original certification does not grant similar privileges. Nevertheless, the court below indicated that the Florida legislature has conferred virtually unlimited discretion upon the Board, even as to matters of statutory interpretation (both Florida statutes and those of other states).

prior opinion, that the Board was entitled under the statute to deny reciprocal certificates on the ground of nonresidence. It reaffirmed (at some length) its earlier determination eliminating the two-year residence requirement for certificates by examination, but by its language indicated that a requirement of residence at the time of application was still permissible (the interpretation since followed by the Board).*

Finally, and most significantly, the court held that F. S. 473.16 and F. S. 473.23, requiring that *all* of the Price Waterhouse partners must be Florida-certified before the firm could practice in the state, were valid. Recognizing that, under the standards established by the Board and judicially upheld, Price Waterhouse could not conceivably qualify *all* of its partners, the court directed that upon remand the Circuit Court should allow a reasonable time for Price Waterhouse to hand over the Florida portions of its clients' business to Florida accountants (Appendix A, p. 16a). The court thus gave full rein to the efforts of the Board to force the Price Waterhouse firm to close its work spaces and move its personnel out of the state. In effect, it granted the Board's motion to vacate the stay of injunction.

The decisions of the Florida Supreme Court are entirely harmonious with the prevailing attitude of the local profession. Following those decisions, Price Waterhouse and other national firms unsuccessfully attempted to achieve a legislative remedy by amendment of the statute. While their pro-

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*The court below voided the statutory two-year residence requirement for obtaining a license by examination (see F. S. 471.08), but declined to state (even though appellants' petition for rehearing requested clarification on that precise point) that the statutory requirement of residence at the time of examination was also void. The petition for rehearing and supporting affidavit in the Supreme Court of Florida are set forth in Appendix C. The Board has since taken the position that residence at the time of examination is required. See Appendix D, p. 113a.

posal was under consideration by the legislature, the Board submitted a self-serving report bluntly summarizing its conception of the problem: "Florida has become a rich market for accounting services to local businesses and the out-of-state national firms want a part of it. The Florida practitioners do not want them to have it." (Appendix D, p. 92a.) At the same time the Board readily conceded what it has never denied: "There is no question as to the technical competency [of Price Waterhouse] . . . ." (Appendix D, p. 95a).*

THE QUESTIONS ARE SUBSTANTIAL

(1) The Importance of the Questions.

These cases are important because of the obstacles presented by Florida's statutory scheme, as interpreted and upheld by the court below, to the nation-wide practice of accountancy so necessary to the free flow of interstate commerce.

Corporations operating in interstate commerce typically draw capital and financing from investors and creditors in many states. Such investors and creditors need reliable and credible financial information in order to make decisions to enter into, withdraw from, or continue their investments in or loans to such corporations.

The required reliability and credibility is imparted to corporate financial statements by an independent public accountant who audits those statements and expresses his opinion thereon. In the case of a company engaged in

*This report and the testimony of the Board's Chairman before a joint committee of the Florida House, though both obviously in many respects self-serving, so fully reveal the current attitude of the Board and the local accountants that they are produced in full in Appendix D. A brief but pungent newspaper editorial comment on the local accountants' resistance to changes in the Florida law is set forth in Appendix E.

operations in many states, the auditor must examine not only the financial records and transactions of the parent corporation but also those of its consolidated subsidiaries and divisions whereever located, so that he may attest to the fairness of the financial position and results of operations of the whole interstate business. Without such attestation by means of such an integrated overall audit, the credibility and reliability of financial statements would be substantially diminished, and the flow of creditor and investor capital across state lines would be impeded.

If a single auditing firm is to bear the ultimate responsibility for certification of a corporation's financial statements reflecting operations in many states, that firm can fully undertake and discharge such responsibility only if it itself conducts the audit work. This necessity for overall audit responsibility, particularly in the case of large corporations whose financial statements must meet the exacting scrutiny of regulatory agencies, the financial community and the investing public generally, has led to the development of accounting firms such as Price Waterhouse which operate across state boundaries in order to meet the needs of clients likewise operating across state boundaries, and the needs of investors in those clients.

There are no differences in accounting principles or auditing standards resting on geographical or political distinctions among states. Indeed, all states, including Florida, give a uniform accounting examination, prepared by the American Institute of Certified Public Accountants, and all states, including Florida, use that Institute's grading service (Ex. 11, pp. 6, 8-9; Ex. 12, pp. 54-55). While all states regulate the practice of accountancy, none of them (with the exception of Florida) presently imposes any obstacle to the performance of necessary accounting services by nonresident firms. The trend is towards the adoption of the Model Bill.

of the American Institute of Certified Public Accountants (Ex. 14, sub-Ex.12), now in force in nineteen states, which requires that a permanent resident office be managed by a general partner, certificated and governed by the state and its regulatory agencies and answerable for the conduct of all his partners, and that each partner of the firm possess a certificate in good standing from some state. A few states, however, require all partners of a firm to be licensed in the state as a prerequisite to practice, but all of them (other than Florida) have made such licenses readily available to accountants engaged in interstate practice on the basis of their licenses from another state. Such state licensing policies recognize that with the benefits of expanded interstate corporate activity, and the disclosure needs of investors, as exemplified by the requirements of federal securities laws and regulations, must come likewise the realization and acceptance of the fact that the practice of accountancy as well is national in scope and cannot be fragmented to further the economic interests of a local guild.

No state has benefited more than Florida from the tremendous industrial expansion of the nation since World War II. Yet no state has resisted more fiercely recognition of the legitimate requirements of national business and financial institutions which have contributed so largely to Florida's burgeoning prosperity. That resistance is manifested here by the increasingly strident efforts of the local accountants, aided by a highly restrictive statute—depression-born and now obsolete in view of Florida's industrialization—and a cooperative regulatory Board, to exclude national accounting firms such as Price Waterhouse from any substantial practice in the state.

(2) The Constitutional Gravity of the Questions.

The resulting Florida regulatory scheme, as applied and upheld below, is fundamentally opposed to the first prin-

ciples of our federalism. Its balkanization of the profession, and of the commercial activity affected by the profession, makes state regulations struck down by this Court in the past seem pallid in comparison.

The statute as a whole appears to offer to national firms temporary certification as the only way of servicing their clients with Florida operations. The Board emphatically sealed that route (Rule 20-9.03), as well as the alternative of permanent certification for all the partners. On the second and last trek through the Florida Supreme Court, only one, final course has been suggested to appellants, namely, to "purchase" the services of local Florida accountants as correspondents. That course is not a meaningful alternative; it merely demonstrates that there are no remaining openings in the statute and that Price Waterhouse is to be effectively excluded from the state.

It is thus clear that appellants have gone to extraordinary lengths during this Sisyphean litigation to satisfy the requirements of Florida's regulatory scheme. In so doing, they have tested that scheme from all sides, thereby building a procedural record for ultimate review by this Court of Chapter 473, Florida Statutes, as applied. We submit that the provisions of that statute inhibiting the practice in Florida of demonstrably qualified accountants—particularly the means of wholesale exclusion implemented by F. S. 473.16 and F. S. 473.23—should be struck down in their entirety as inconsistent with the Constitution and the decisions of this Court.

First. Commerce Clause. National accounting firms such as Price Waterhouse must operate across state boundaries in order to meet the audit needs of clients likewise operating across state boundaries. Hence accountancy as practiced by the Price Waterhouse firm is unquestionably part of the trade and commerce flowing between the states.

See *United States* v. *Shubert*, 348 U. S. 222, 226; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 549-50.

The activity of Price Waterhouse in interstate commerce on behalf of its many interstate clients with Florida operations is substantially impeded by Chapter 473. That statute therefore imposes an unconstitutional burden on interstate commerce.

The crucial elements of that statute are F. S. 473.16 and 473.23, which require that all of the partners must obtain permanent Florida licenses before any member of the firm can practice on a regular basis in Florida. If, like most other states, Florida required that only the resident partners in Florida be licensed, all requirements of Chapter 473, no matter how onerous, could be met. But F. S. 473.16 and 473.23, as interpreted and applied and in conjunction with the rest of the regulatory scheme, make it literally impossible for the Price Waterhouse firm to qualify simply because its partners are nonresidents. Such discrimination, on grounds unrelated to proficiency, against an out-of-state firm operating in interstate commerce, operates to foster a local monopoly and in no way serves to protect the Florida public.

We recognize of course that Chapter 473 has other purposes in addition to the one challenged here. But its salutary objective of regulating and controlling the practice of accountancy in order to protect the Florida public is not furthered by excluding out-of-state firms such as Price Waterhouse who are entirely willing to submit themselves to local regulation just as they do in the other states. And the fact that all of the other states have been able to regulate their own accountants and at the same time to assimilate the national firms shows presumptively that a nondiscriminatory alternative is available to Florida. As already noted, many states have adopted the Model Bill of the

American Institute of Certified Public Accountants (Ex. 14, sub-Ex. 12), which contemplates a permanent resident office managed by a general partner who is certificated by, and is answerable for his entire firm to, the state's regulatory agency.* Not a single other state has in effect a regulatory scheme such as Florida's.

Having rejected the nondiscriminatory alternative, Florida cannot be heard to rely on notions of protecting the public welfare to justify this anticompetitive aspect of the statute. The Court thus need not explore the possible philosophical differences reflected in such opinions as *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349; *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, and *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. Even under the approach ac-

*In the courts below, the Board contended, without supporting rationale, that F. S. 473.16 is necessary to the maintenance of Florida accounting standards. How this is so, when a resident partner would fully bind his nonresident partners for the protection of the Florida public, is not explained. In any event, if such a provision can ever be justified, it must be under circumstances of liberal and reasonable enforcement when the nonresident firm attempts in good faith to submit all of its partners en masse to the jurisdiction of the regulatory agency, as appellants did here. Instead, the Board arbitrarily denied the handful of reciprocal applications it acted upon on grounds of nonresidence that plainly cannot be complied with by members of a national accounting firm. The applications were not denied on grounds relating to proficiency; indeed, the proficiency or technical competence of appellants has never been challenged or questioned by the Board.

The Board's allusion to possible lowering of standards is particularly suspect, moreover, in view of the remarkable history of the accounting profession in Florida. Chapter 473 was enacted in 1931, at a time when three national firms maintained permanent offices in the state. Those firms have since been exempted from the requirements of F. S. 473.16 by virtue of a "grandfather" proviso in that section. As a result, for the past thirty-five years those national firms have freely operated in Florida without obtaining certificates for their nonresident partners and without any adverse effect on local accounting standards or on the Florida public. *See State Board of Accountancy* v. *Webb*, 51 So. 2d 296 (Fla. 1951), where the grandfather proviso is explained.

cording considerable latitude to state regulation (*e.g.*, the formulation expressed by Mr. Justice Black dissenting in *Hood*, 336 U. S. at 550-64), the present statute cannot stand, because the effect on interstate commerce is so total and discriminatory and because the local interest in exclusion is so unworthy.

Here we are confronted with a statute that goes far beyond the type of regulation condemned in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, where the statute appeared to promote a legitimate state interest in train safety but, unhappily, burdened interstate commerce. In the present case we find a state statute that burdens and actually discriminates against interstate commerce in order to protect a local monopoly. The "sole aim" of F. S. 473.16 is precisely the opposite of that sustained in *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 445. In view of the national policies reflected by the antitrust laws, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U. S. 341, the state interest in protecting its local guild should not be even weighed in the balance. Indeed, it is not at all clear that the Florida public is benefited in the long run by a form of protectionism that deprives it of ready access to the services of highly trained, widely experienced, professional men. Such an interest can never be justified as permissible state regulation of interstate commerce under the doctrine of *Cooley* v. *Board of Wardens*, 12 How. 298, 319-20. *See Toomer* v. *Witsell*, 334 U. S. 385, 407 (Frankfurter, J., concurring).*

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*The state interest is not supported by analogy to the legal profession. Such an analogy would appear to be self-defeating because the states have far greater reason to require localization of law partnerships than accounting partnerships due to the differences among the states in the subject matter of the lawyer's practice as contrasted with the uniform principles and practices employed by accountants. In fact, however, state regulation of law partnerships is not as restrictive and exclusionary as Florida's regulation of accounting partnerships. There are no special provisions regarding partnerships

Finally, we find compelling support for our position in the culmination of the long series of milk cases decided by the Court under the commerce clause, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361. In that case, which also involved a Florida regulatory scheme favoring local interests, the Court unanimously struck down the underlying statute without even stopping to consider whether there existed a non-discriminatory alternative. The discrimination against interstate commerce in *Polar* was less blatant and less absolute in its impact than that caused by Chapter 473. Perhaps even more compelling is *Railroad Transfer Service, Inc.* v. *City of Chicago*, 386 U. S. 351, where the Court just last Term struck down a licensing scheme far less onerous than the one challenged here.*

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in the state laws and regulations with respect to admission to the bar and the illegal practice of law. *See generally West Publishing Company, Rules for Admission to the Bar* (1963); *American Bar Foundation, Unauthorized Practice Statute Book* (1961). The regulation of law partnerships is thus left to Canon 33 of the Canons of Professional Ethics, which has recently been interpreted by the American Bar Association's Committee on Professional Ethics in its Opinion 136 to permit interstate partnerships. *See* 53 A.B.A.J. 353 (1967).

The increasing interstate mobility of lawyers, however, especially in connection with civil rights cases, is provoking exclusionary efforts in some states. *See* Note, 67 COLUM. L. REV. 731 (1967); Note, 80 HARV. L. REV. 1711 (1967).

*We are not unmindful of a Florida decision ten years ago, *Morgan* v. *Oosterhoudt*, 96 So. 2d 139 (Fla. 1957), an appeal from which was dismissed by this Court for want of a substantial federal question, 355 U. S. 603. There the Florida court held that a Florida-licensed accountant could not practice in that state as a member of a national firm whose partners were not Florida-licensed. While we believe that the *Morgan* case was wrongly decided by the Florida court, it is understandable why this Court dismissed. The federal grounds were not raised until a petition for rehearing in the Florida Supreme Court and then only in conclusional form. *See* Appellees' Motion to Dismiss, No. 623, October Term, 1957, at 6-8. Nor was there any showing made that the statutory scheme, as applied and in light of the conditions then prevailing in Florida, inhibited a non-resident firm from performing required services for its interstate clients under temporary licenses. The record here is entirely different. And even if the constitutional argument had been properly presented and supported, dismissal did not constitute an adjudication on the merits. *Compare Naim* v. *Naim*, 350 U. S. 891, *with Loving* v. *Virginia*, 87 S. Ct. 1817.

Second. Due Process. The impact of the regulatory scheme also denies appellants due process under the fourteenth amendment. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-39. *See* Comment, 56 MICH. L. REV. 415, 418-19 (1958).

Chapter 473 as applied unquestionably deprives the Price Waterhouse partners of the freedom to engage in their chosen professional activity within Florida, and it curtails the freedom of the firm's clients to employ accountants of their choice. This substantial impingement on freedom of contract should be supported by at least some showing of benefit to the Florida public, and no such showing can be made here. Any due process inquiry, therefore, must be undertaken in the context of this wholly inadequate police power justification.*

We start with a statutory scheme suspect on its face, since it is enforced not by a disinterested authority but by a local board whose very members have an economic interest in the subject matter. *Cf. Lathrop* v. *Donohue*, 367 U. S. 820, 878 (dissenting opinion); *Silver* v. *New York Stock Exchange*, 373 U. S. 341. It is subject to the further infirmity that a nonresident accountant has no voice in the membership of the regulatory body or in the closely affiliated local professional group, the Florida Institute, whose interests the Board necessarily reflects. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50. As a result, in so far as Florida and the Board purport to deal

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* The only "justification" that has been advanced so far is Florida's splendid climate, which, according to a Board witness, causes an influx from the North, "a tourist situation." (Ex. 12, pp. 65-66.)

with nonresidents, the political restraints normally present in our society are totally lacking. *Edwards* v. *California*, 314 U. S. 160, 174; *South Carolina Highway Dep't* v. *Barnwell Bros.*, 303 U. S. 177, 185 n.2. Where the legislative policy and the state agency naturally tend to be less responsible, it is incumbent upon this Court to undertake a more searching inquiry into the constitutionality of the regulatory scheme that is challenged. *See United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n.4.

Against this background it is hardly surprising to find that the statutory scheme has been implemented to exclude admittedly competent accountants on grounds utterly unrelated to the protection of any legitimate police power interest, and with the intent and effect of promoting a local monopoly. The statute as applied is thus invalid under the due process clause. That conclusion follows either under the unreasonable, arbitrary, and capricious test traditionally applied or under the "less-restrictive alternative" principle.* Every other state in the Union has found and adopted a "less-restrictive alternative" than Florida's for handling the identical problem of regulating the practice of accountancy.

Third. Equal Protection. The statute and implementing regulations as applied raise substantial equal protection questions.

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*It has recently been suggested that the proper due process approach to economic regulation is the less-restrictive alternative principle, whereby such regulation would violate due process if the state, under its police power, can fully achieve the purposes of the challenged regulation by one or more narrower regulations. Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). Such an approach is consistent with the Court's formula for determining the validity of governmental regulation infringing fundamental personal liberties. *E.g.*, *Aptheker* v. *Secretary of State*, 378 U. S. 500, 507-14 (travel); *Sherbert* v. *Verner*, 374 U. S. 398, 406-09 (exercise of religion); *Shelton* v. *Tucker*, 364 U. S. 479, 487-90 (speech). *See also Griswold* v. *Connecticut*, 381 U. S. 479, 485-86 (privacy).

"Judicial inquiry under the equal protection clause . . . . must reach and determine the question whether classifications drawn in a statute are reasonable in light of its purpose . . . ." *McLaughlin* v. *Florida*, 379 U. S. 184, 191. The constitutionally permissible purpose of the regulatory scheme can in no event extend beyond necessary protection of Florida residents as consumers of accounting services. That purpose is achieved by ensuring that those persons who hold themselves out to Florida residents as qualified to perform the services of an independent public accountant are in fact so qualified. As the Court said in *Schware* v. *Board of Bar Examiners* with reference to state regulation of the profession of law, "A State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." 353 U. S. at 239. It is by that purpose—ensuring fitness or capacity to practice—therefore, that the classification drawn in determining appellants' right to practice in Florida must be judged.

Consider the classifications involved here. Florida residents are eligible to obtain licenses to practice accountancy; the nonresident appellants are not. Resident accountants other than appellants who were originally licensed by states which grant "similar privileges" to Florida accountants are eligible for Florida certificates by reciprocity; appellants, no matter how competent, are prevented from receiving such certificates because originally licensed by states which in the Board's view do not grant "similar privileges" to Florida accountants.*

*The Board even applied the "similar privileges" standard discriminatorily against appellants. It rejected license applications by appellants originally licensed in New York, California, Pennsylvania, New Jersey and Massachusetts on the ground those states do not grant "similar privileges" to Florida accountants. Yet the Board had previously issued over 300 reciprocal certificates to out-of-state

All of these distinctions or classifications are palpable denials of equal protection because the criteria for making the classifications have no rational connection with an applicant's fitness or capacity to practice public accounting.

Fourth. Privileges and Immunities. The regulatory scheme as applied also conflicts with the privileges and immunities clause of the fourteenth amendment.

As the *Slaughter-House Cases*, 16 Wall. 36, and subsequent cases have made clear, that clause protects privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, *or its laws.*" 16 Wall. at 79 (emphasis added). That principle has recently been applied by the Second Circuit *in banc* in *Spanos* v. *Skouras Theatres Corp.*, 364 F. 2d 161 (1966), *cert. denied*, 385 U. S. 987, to a situation closely analogous to the present case. In *Spanos* the court by Judge Friendly held that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." 364 F. 2d at 170. Recognizing the increased specialization and interstate mobility of the bar, the court stated that "where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgement must be read to include what is necessary and appropriate for its assertion." This right "must comprehend the right to bring to the as-

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accountants, at least some of whom appear to have been originally certified by those same states. Even the court below characterized such discrepancy as "a bit odd." (Appendix A, p. 9a).

The "similar privileges" requirement was apparently accorded great weight in both courts below, App. A, pp. 5a-7a, 15a, 24a, because of the view that the values at stake in this litigation are founded on nothing more than a "privilege," as distinguished from a "right." *But see, e.g., Schware* v. *Board of Bar Examiners*, 353 U. S. at 239 n.5.

sistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective . . . ." *Ibid.*

Rights and obligations under the federal securities laws are inseparable from the activities of a large number of the Price Waterhouse clients and of the firm itself. Those laws and SEC regulations thereunder require regular and extensive financial disclosures to the investing public, certified by independent public accountants meeting Commission-prescribed qualifications.* Surely the client's duty of thoroughgoing compliance with the federal securities laws must have as its correlative the privilege of free access to the services of whatever independent accountants, recognized as qualified by the Commission, the client thinks "best fitted for the task." *See Spanos* v. *Skouras*, 364 F. 2d at 170. And surely such recognized public accountants, in undertaking the high responsibility of certifying the fairness of financial information broadly disseminated to the national investing public, must likewise be privileged to perform their work "in whatever manner is most effective" to the proper discharge of their obligations to client and public. *Ibid.* Such correlative privileges cannot properly be abridged by the parochial interests of local economic protectionism so manifest in the instant cases. *Cf. Sperry* v. *Florida*, 373 U. S. 379; *Toomer* v. *Witsell*, 334 U. S. 385.

CONCLUSION

These cases boil down to a question whether, in the last third of the twentieth century, Florida or any other state in this Union can exclude from its borders, in the interest

*The Commission will not recognize as qualified any person as a certified public accountant who is not duly registered and in good standing as such under the laws of the place of his residence or principal office. 17 C.F.R. § 210.2-01(a) (1964).

of economic protectionism, unquestionably qualified independent accountants whose services across political boundaries are essential to the unimpeded flow of capital and resources in interstate commerce. For if Florida can properly accomplish the exclusion so far countenanced by its legislature and courts, so can any other state. The ultimate result of such exclusionary regulation on a broad scale would be fragmentation of audit responsibility for the financial statements of multi-state companies among as many local accounting firms as the number of states in which the companies operated. Neither that result, nor its Florida beginnings, can be tolerated in our federal regime.

For all of the foregoing reasons, probable jurisdiction of these appeals should be noted and a hearing on the merits granted.

Respectfully submitted,

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July 22, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 406

HUGH MILLER MERCER, *et al., Appellants,*

—against—

ARTHUR I. HEMMINGS, *et al., Appellees.*

No.

HERMAN W. BEVIS, *et al., Appellants,*

—against—

MARK W. EASTLAND, *et al., Appellees.*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL STATEMENT

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Appendix A

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IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1966

HUGH MILLER MERCER, ET AL.,
Appellants,

vs.

ARTHUR I. HEMMINGS, ET AL.,
Appellees.

CASE No. 34,373

Opinion filed November 23, 1966

AN APPEAL FROM THE CIRCUIT COURT FOR ALACHUA COUNTY, JOHN A. H. MURPHREE, Judge

HERVEY YANCEY, CROMWELL A. ANDERSON, LOUIS BONSTEEL and SMATHERS & THOMPSON,
for Appellants

CHESTER BEDELL, for Appellees

ROBERTS, J.

This cause is before the court on appeal from a "Supplemental Decree Pursuant to Mandate" entered by the trial court following the going down of the mandate of this court in *Mercer v. Hemmings*, Fla. 1965, 170 So. 2d 33.

The facts of the case are stated in considerable detail in our former opinion. Among other things, it concerns

the validity of a regulation promulgated by the appellees, as members of the Florida State Board of Accountancy ("the Board" hereafter) respecting the issuance of temporary certificates to out-of-state firms to fulfill "specific engagements" for accounting services in this state under contracts entered into outside the state, as authorized by Section 473.14, Florida Statutes. The regulation in question—paragraph (3) of Rule 20-9.03 of the Board—was attacked in a suit for declaratory relief filed by the appellants, plaintiffs below, as members of the firm of Price Waterhouse & Co., a large firm of public accountants engaged in a nation-wide accounting business. All members of the firm are licensed as certified public accountants in one or more states of the union; however, none is licensed in Florida as a Certified Public Accountant, nor did any member reside in this state at the time the suit was filed.

Because of the stringency of our statutory regulations respecting the licensing of certified public accountants and the practice of public accounting in this state by such certified public accountants, Price Waterhouse has been unable to perform accounting services in this state for its out-of-state clients engaged in interstate commerce except under the authority of temporary certificates which were routinely issued to it by the Board for a great many years. In 1962, however, their "specific engagements" had grown to such an extent as to require the establishment of permanent offices in Miami and Tampa, and the permanent assignment of personnel to those areas. Upon learning of this, the Board adopted paragraph (3) of Rule 20-9.03, reading in part as follows:

> "Temporary certificates will not be issued to firms or persons maintaining a full time staff in the State of

> Florida, and using facilities for full time practice of public accounting as distinguished from fulfilling specific engagements under temporary certificates."

and notified Price Waterhouse that it would deny further temporary certificates as long as Price Waterhouse maintained a full time staff resident in Florida.

This suit for declaratory relief followed, in which Price Waterhouse sought a ruling either (1) that the above-quoted provision of Rule 20-9.03 and the statute taken together, as applied to Price Waterhouse, were invalid; or (2) that Price Waterhouse could continue its public accounting practice in this state so long as it did not hold itself out to the public as a firm of *Florida* certified public accountants. The second contention was made in reliance on the decision of this court in Florida Accountants Association v. Dandelake, Fla. 1957, 98 So. 2d 323. The defendant Board, appellees here, filed a counterclaim, asking the court to enjoin Price Waterhouse from practicing accounting in this state except under the temporary certificates theretofore issued by the Board or such other certificates as might thereafter be lawfully issued by the Board.

The trial court denied the relief sought by Price Waterhouse and granted that sought by the Board. On appeal to this court, the decree of the trial court was affirmed in part and reversed in part and the cause remanded to the lower court. Pursuant to our mandate, and after a hearing, the trial court entered its "Supplemental Decree Pursuant to Mandate," which decree has been brought here for review by Price Waterhouse. One of the complaints made here by the appellant is that the Supplemental Decree did not delete the injunction previously entered against Price Waterhouse, upon the counterclaim of the

Board, and simply stayed the enforcement thereof until such time as the members of the firm of Price Waterhouse could become certificated in this state by reciprocity or examination. By motion, the Board has asked this court to vacate the stay of injunction, for the reason that it is impossible, under existing statutory provisions, for Price Waterhouse to qualify each and every member of the firm for licensing as a Florida certified public accountant, by examination or by reciprocity, thereby making it impossible for the firm to engage in the practice of public accounting in this state except under temporary certificates.

The problem is not now new here. The activities of the Board have been before this court in Morgan v. Oosterhoudt (Fla. 1957) 96 So. 2d 139; Florida Accountants Association v. Dandelake (Fla. 1957) 98 So. 2d 323; Mercer v. Hemmings (Fla. 1964) 170 So. 2d 33, and now again in the Mercer case to review the judgment on remand of the trial court; also before the District Court of Appeal, First District, in Bevis v. Eastland (Fla. 1966) 186 So. 2d 818, now pending here on writ of certiorari.

In the case sub judice, the litigants have submitted a number of questions. After blowing the chaff from the grain, the controversy to be decided is:

(1) Is it necessary for all the partners in Price Waterhouse to hold Florida certificates in order for such firm to practice in this state?

(2) Is it lawful for a person holding a Florida certificate, to practice accounting thereunder by accepting employment from Price Waterhouse and selling their work product to Price Waterhouse for use in making the master audit of interstate clients?

(3) Are the members of Price Waterhouse entitled to the issuance of a reciprocal certificate upon dis-

playing a certificate issued by another state which does not necessarily have the same admission requirements as Florida and which members are not two-year residents of this state?

(4) Are members of Price Waterhouse, who do not meet the two-year residence requirements, but who meet the other admission requirements entitled to take the Florida examination?

(5) Does Price Waterhouse have the *right*, as distinguished from the *privilege*, to continue to receive temporary certificates notwithstanding Board Rule 20-9.03?

Upon the authority of Morgan v. Oosterhoudt, supra, we held that a non-resident firm of accountants cannot practice as a firm or under a firm name unless every member of such firm holds a Florida certificate. Section 473.23, Florida Statutes, among other things provides:

> "It is unlawful for any person holding a certificate as a certified public accountant, * * * to act as the representative, agent or manager, in the State of Florida, in connection with the practice of public accounting, of any person not authorized under the provisions of this chapter to practice public accounting in this state, or of any firm or association of persons, unless each member of such firm or association of persons shall be authorized to practice public accounting in this state under the provisions of this chapter; * * *".

However, this statute was certainly not intended to prevent a Florida certified public accountant from making audits

within this state under the employment of and for the use of accounting firms in other states in making master audits of clients engaged in interstate commerce. A contrary construction would put the constitutionality vel non of the statute in grave doubt under the constitutions of the United States and the State of Florida. It has long been the policy of this court, where possible, to place such construction on a statute as would preserve its constitutionality. In Morgan v. Oosterhoudt, supra, the view of this court was expressed in this language:

> "We do not think the statute prohibits a licensed Florida accountant from practicing public accounting in this state in his own name, even though he may have an interest in a non-resident firm of accountants; he is simply prohibited from practicing in this state *as a member* of such firm and from representing that such firm is practicing as 'Certified Public Accountants' unless the members thereof are Florida CPA's. This does not appear to be unreasonable in view of the fact that the qualifications prescribed for certified public accountants and the administration of such Acts must necessarily vary from state to state."

We now become concerned over the *right* in contrast with the *privilege* of the members of Price Waterhouse, all of whom hold certificates in some state, to have reciprocal certificates issued to them by the Florida Board. This identical question was decided by the District Court of Appeal, First District, in Bevis v. Eastland (April 28, 1966) 185 So. 2d 819, and we quote with approval from that decision:

Appendix A

"We will first dispose of petitioners' contentions that the action of the Board is '* * * in violation of petitioners' rights under the Florida and United States Constitution.' A concise definition of reciprocity is set out in Volume 36, Words and Phrases, Permanent Edition, p. 770, viz.: '"Reciprocity" denotes mutuality, or the relationship existing between states when each gives citizens of other certain favors or privileges that its own citizens enjoy at hands of other state; and applicant for certificate of registration as professional engineer has no vested right to have board issue him certificate merely because he held certificate of registration granted him by proper authorities in another jurisdiction.' Also see Spindel v. Jamison (1958), 199 Va. 954, 103 S. E. 2d 205, 208. Thus, it is apparent that the reciprocal certificates as outlined in the quoted statute are 'privileges', as distinguished from 'rights' which privileges have been authorized by the grace of the sovereign state of Florida. It necessarily follows that the grant of such privileges by the sovereign does not create a constitutional right in the applicants to practice their profession of accountancy in the state of Florida under Chapter 473, Florida Statutes, F. S. A.

"We next go to the question of whether the denial of the petitioners' applications for reciprocal certificates on the ground of nonresidency is contrary to fact and law. Petitioners take the position that Mercer v. Hemmings, as a matter of law, struck 'residence' as a prerequisite for qualifying under the statutory reciprocity provision and concluded that

the Board cannot consider such condition in weighing 'similar privileges' as set out in the statute authorizing the granting of reciprocal certificates. Such a contention cannot be sustained. In short, the Board has construed the reciprocal statute to mean that it authorizes the granting of a certificate to an applicant who was originally certified in another state, if that state would do likewise for a Florida resident who is in a similar situation. If such criterion is not met, the Board is well within its discretionary power to refuse to grant reciprocity, and we find in this record competent evidence to sustain the finding of the Board."

The rationale of our holding in Mercer v. Hemmings, 170 So. 2d 33, was that the lack of two years of residence would not operate to prevent an applicant otherwise qualified from taking the examination, nor from receiving a reciprocal certificate where the applicant is otherwise eligible and the state of certification does not require residence; but it was not our intention to eliminate residence as requirement of reciprocation where the state of certification requires residence.

The statute gives the Board wide discretion in the issuance of reciprocal certificates and also temporary certificates, but the Board must remember that this is not a unbridled discretion and the abuse of it can become a judicial question. We do not know from the record before us whether or not the Board has granted reciprocal certificates to some persons not employed by Price Waterhouse from states requiring residence and then refused to issue certificates to Price Waterhouse partners certified in the same states, but we do observe that there have been more than three hundred

reciprocal certificates issued. The vesting of discretion in any administrative agency carries with it much authority, but that authority is interwoven with responsibility to exercise such discretion in a not unreasonable manner. We cannot refrain from commenting that it does look a bit odd that over three hundred reciprocal certificates have been issued to other non-resident accountants, while every application considered of a partner in Price Waterhouse thus far has been denied. In this connection compare State ex rel. Markley v. Bartlett (Conn.) 32 A 2d 58.

The question then arises as to requirement for two years residence in Florida prior to the taking of the examination, where the applicant meets the other requirements. See Florida Statutes Sec. 473.08 (1 and 3). The regulation of the profession of accounting is an exercise of the police power, for the benefit and protection of the public and is not intended as economic protection for the profession from prospective competitors. Little, if any, reason can be found for requiring a certified public accountant of another state to cease his profession, close his office, and bask in the Florida sunshine for a period of two years before taking the examination. Successful and worthy persons in other states, the kind of citizens we want in Florida, are from a practical standpoint banned from ever becoming Florida Certified Public Accountants. Our state spends large sums of money each year advertising the advantages of Florida residence, and it would be strange indeed to invite people to reside here but deny them the privilege of taking a professional examination until a long period of residence could be established. Florida is not an island, nor is a visa or passport required of citizens of the United States upon entering it; nor is a visa certifying to two years of residence or clerkship within our borders required to enter a professional examination. We

hold that it is unreasonable to require two years of residence or clerkship within the state as a prerequisite, and the portion of the statute, so requiring, is unreasonable and void.

In State ex rel. James v. Gerrell (Fla.) 188 So. 812, the Court in striking down a residency requirement for an auctioneer's license said:

> "Section Eight of Chapter 18069 also provides that it shall not apply to any person who is a resident of Florida engaged in selling goods, wares, or merchandise for a period of twelve months in the year, provided said person, firm, or corporation shall have maintained and conducted an established place of business for such purposes, and has been engaged in such business for a period of not less than five years in the community wherein the auction sale is to be held.
>
> "Here we have a classification based on residence and the length of time one has been engaged in business. This Court has condemned classifications based solely on the ground of residence or on the difference of time the persons licensed have been engaged in business, and there appearing no other basis for this classification, we are impelled to hold it bad."

In Harper v. Galloway, 51 So. 226, 58 Fla. 255, 26 L. R. A. N. S., 794, 19 Ann. Cas. 235, the court struck down a law placing an additional burden on non-resident hunters of Marion County because it violated the Fourteenth Amendment of the Constitution of the United States. Again, in Hamilton v. Collins, (Fla.) 154 So. 201, this court struck down an ordinance exacting different license fee for selling bakery products in the city by a non-resident

because it violated the 14th Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights. See also Accounting Corporation of America v. State Board of Accountancy (Calif.) 208 P. Rep. 2d 984, in which the Supreme Court of California said:

> "But where a statute discriminates against individuals or corporations solely because they are new to the field and such discrimination does not appear to have any relation to the public interest, the legislation disregards constitutional protections against arbitrary classification. Mayflower Farms v. Ten Eyck, 297 U. S. 266, 56 S. Ct. 457, 80 L. Ed. 675; Del Mar Canning Co. v. Payne, 29 Cal. 2d 380, 175 P. 2d 231; Van Harlingen v. Doyle, 134 Cal. 53, 66 P. 44, 54 L. R. A. 771; Soares v. City of Santa Maria, 38 Cal. App. 2d 215, 218, 100 P. 2d 1108; In re Fasset, 21 Cal. App. 2d 557, 69 P. 2d 865."

In Wormsen v. Moss, 29 N. Y. S. 2d 798, the Supreme Court of New York struck down a residence requirement as a prerequisite to the issuance of a license to act as a massage operator, and said (p. 801):

> "In so far as one is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Smith v. State of Texas, 233 U. S. 630, 636, 34 S. Ct. 681, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420. That broad affirmation of our respect for the free right to labor is subject to the qualification that the right may be interfered with by the state, in

the exercise of its general police power, in the interests of health, morals, safety or welfare of the community. Such action of the state must, however, be reasonable, bear a just and reasonable relation to the promotion of the general welfare, and avoid arbitrary discrimination between persons. A statute enacted in the exercise of the police power must have been passed to prevent some manifest evil or to preserve public health, morals, safety or welfare. The test is always whether the regulation is reasonable within those limits. Smith v. State of Texas, supra; Burns Baking Co. v. Bryan, 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813, 32 A. L. R. 661; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D, 550, Ann. Cas. 1915B, 1254, affirmed, 239 U. S. 195, 36 S. Ct. 86, 60 L. Ed. 218; Ives v. South Buffalo Railway Co. 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. N. S. 162, Ann. Cas. 1912B, 156; . . . . .

". . . Classification as between citizens and aliens is permissible, but the classification must have some reasonable basis in the welfare of the community."

The court then recited from Miller v. City of Niagara Falls, 207 App. Div. 798, 202 N. Y. S. 549), and also recited from Magnani v. Harnett, 257 App. Div. 487, 14 N. Y. S. 2d 107, affirmed 282 N. Y. 619, 25 N. E. 2d 395:

". . . In the present case the relator's business is in no way injurious to the morals, the health, or even the convenience of the community, provided only he has the requisite knowledge upon the subjects prescribed by the legislature to practice his calling without endangering the health of his patrons."

We think the language taken from the Magnani case, supra, applies here. So long as the certified public accountant is otherwise qualified, we see no way in which his lack of two years' residence can be injurious to the morals, health, safety or welfare of the community.

We know from experience here that there are many overlapping and conflicting statutes and rules regulating the professions and regulated and unregulated vocations. For example: Between medical doctors, dentists, osteopaths and chiropractors; also between architects and engineers; lawyers and licensed realtors in the handling of real estate transactions, certified public accountants, uncertified accountants and bookkeepers; registered nurses and practical nurses; barbers and beauticians, licensed masseurs and reducing gymnasiums, and so on. It has been necessary in the judicial process to resolve these conflicts by the application of a reasonable interpretation in the construction of the conflicting regulations. Compare: Keyes Co. v. Dade County Bar Association (Fla. 1950) 46 So. 2d 605, and Florida Board of Massage v. Underwood (Fla. 1950) 45 So. 2d 184; 17 ALR (2d) 1181. And so it is that almost always the question of whether or not certain conduct falls within the condemnation of the regulatory statute is a mixed question of law and fact. In this case, the chancellor, after hearing voluminous testimony, held:

> "The accounting services that have been rendered by the plaintiff partners in Florida under such temporary certificates and that are being rendered by plaintiff partners in Florida and in which plaintiff partners' Florida employees are engaged and in which plaintiff partners' Florida offices are used, were not and are not ordinary or routine accounting services

such as are or may lawfully be performed by bookkeepers but were and are services that only certified public accountants or public accountants are qualified and eligible to perform, consisting of the examination and auditing of books, statements and other records prepared and kept by others, and the preparation of reports of such examinations and audits, including certificates and expressions of opinions as to the correctness and fairness of the matters certified, and consisting in large part of the preparation and certification of reports and statements to be filed with public agencies of the Federal Government, the State of Florida and other governmental agencies requiring certification of such statements by independent public accountants, as well as the preparation and certification of financial statements to be presented to banks and other lending institutions in connection with applications for loans or extensions of credit. The work performed by these Florida employees was and is performed under the supervision of one or more of the plaintiff partners."

We agree that such finding of fact is supported by the record, and constitutes a violation of the statute.

We now come to the last material question, as to whether or not the Board has the power to refuse temporary certificates. Florida Statute 473.14 provides:

"473.14 *Temporary certificate.*—The board may, in its discretion, adopt rules and regulations providing for the issuance of temporary certificates to persons for the purpose of enabling such persons to fulfill specific engagements or employments, the con-

tracts for which were entered into beyond the limits of the state."

What we have said previously in this opinion concerning "discretion" applies here, but we hold that Section 473.14 is a valid exercise of legislative power and that Rule 20-9.03, on its face is within the lawful power of the Board.

In summary, we hold:

1. It is necessary for all partners in Price Waterhouse to hold a Florida certificate before the firm can practice as certified public accountants in this state.

2. It is lawful for a person holding a Florida certificate to practice accounting thereunder, accepting employment from Price Waterhouse as a client and selling their work product to Price Waterhouse for use in making the master audit of inter-state clients.

3. The members of Price Waterhouse are not entitled, as a matter of right, to the issuance of a reciprocal certificate upon displaying a certificate issued by another state which does not necessarily have the same admission requirements as Florida, but are entitled to a fair and reasonable exercise of the Board's discretion.

4. Members of Price Waterhouse who do not meet the two-year residence requirement, but who meet the other admission requirements, are entitled to take the Florida examination, because the section of the statute requiring two years' residence is void.

5. Price Waterhouse does not have the *right*, as distinguished from the *privilege*, to continue to receive temporary

certificates notwithstanding Board Rule 20-9.03, but they are entitled to have the impartial and reasonable exercise of the Board's discretion.

Nothing in this opinion shall be construed as receding from any part of the decision of this court in Florida Accountants' Association v. Dandelake, (Fla. 1957), 98 So. 2d 323.

This litigation originated in a court of equity. The continuity of important business institutions requires that a reasonable time, to be fixed by the chancellor, be allowed for the Florida clients of Price Waterhouse to make an appropriate transition of their business and to allow time for persons involved in this case, so desiring and qualified, to stand the examination for a C.P.A. Certificate.

Accordingly, the cause is affirmed in part and reversed in part and remanded to the chancellor for further consideration not inconsistent with this opinion.

It is so ordered.

THORNAL, C. J., THOMAS, O'CONNELL, CALDWELL and ERVIN, JJ., and KANNER, District Court Judge (Retired), concur

Appendix A

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1967

WEDNESDAY, FEBRUARY 22, 1967

HUGH MILLER MERCER, ET AL., *Appellants,* vs. ARTHUR I. HEMMINGS, ET AL., *Appellees.*	Case No. 34,373

On consideration of the Petition for Rehearing filed by Attorneys for Appellant,

IT IS ORDERED by the Court that said Petition be, and the same is hereby, denied.

A True Copy
TEST:

SID J. WHITE

Sid J. White

Clerk Supreme Court.

cc: Messrs. Smathers & Thompson
Messrs. Bedell, Bedell, Dittmar & Smith
Honorable Raymond E. Rhodes

Appendix A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1966

HERMAN W. BEVIS, et al., individually and as partners doing business under the firm name of Price Waterhouse & Co.,

Petitioners,

vs.

MARK W. EASTLAND, et al.,

Respondents.

CASE No. 35,360

Opinion filed November 23, 1966

Writ of Certiorari to the District Court of Appeal, First District

Harvey Yancey, Cromwell A. Anderson, Louis S. Bonsteel and Smathers & Thompson, for Petitioners

Chester Bedell, Ronald L. Palmer and Bedell, Bedell, Dittmar & Smith, for Respondents

ROBERTS, J.

We here review by certiorari a decision of the District Court of Appeal, First District, affirming a ruling by the State Board of Accountancy denying reciprocal certificates

to certain persons for various reasons. See Bevis v. Eastland (DCA 1) 186 So. 2d 818.

The petition for certiorari was buttressed by a certificate of the District Court that the case passes upon a question of great public interest, and we therefore have jurisdiction under Article V, Section 4(2), Constitution of Florida.

The factual background, questions presented and final decision appear in the opinion of the District Court. We have considered their decision in the light of the decision of this court, this day filed, in Mercer v. Hemmings,—So. 2d —, and finding no error in the decision of the District Court their opinion is adopted as the view of this court and the writ of certiorari heretofore issued is discharged.

It is so ordered.

THORNAL, C. J. THOMAS, DREW, CALDWELL, ERVIN and SEBRING (Retired), JJ., concur

Appendix A

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1967

WEDNESDAY, FEBRUARY 22, 1967

HERMAN W. BEVIS, ET AL., *Petitioners*, vs. MARK W. EASTLAND, ET AL., *Respondents.*	CASE No. 35,360

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that said Petition be, and the same is hereby denied.

A True Copy

TEST:

SID J. WHITE
Sid J. White
Clerk Supreme Court.

cc: Messrs. Saunders & Thompson
Messrs. Bedell, Bedell, Dittmar & Smith
Honorable Raymond E. Rhodes

Appendix A

IN THE

DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1966.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

HERMAN W. BEVIS, et al., individually and as partners doing business under the firm name of Price Waterhouse & Co.,

Petitioners,

vs.

MARK W. EASTLAND, ARTHUR I. HEMMINGS, JAMES D. A. HOLLEY, BENJAMIN E. JAMES and CHARLES W. JOHNSON, JR., as members of and constituting the State Board of Accountancy, etc.,

Respondents.

CASE NO. H-17

Opinion filed April 28, 1966.

Petition for Writ of Certiorari to the State Board of Accountancy.

Smathers and Thompson for Petitioners.

Bedell, Bedell, Dittmar & Smith for Respondents.

RAWLS, Chief Judge.

The partners of Price Waterhouse & Co., an accounting firm, filed their individual applications with the State

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Board of Accountancy seeking the status of certified public accountants in the State of Florida by reciprocity. Each of the applicants take the position he is entitled to such status as a matter of law by reason of the provisions of Section 473.19, Florida Statutes, which provides:

"The board may, in its discretion, issue a certificate as a certified public accountant to any applicant who holds a valid and unrevoked certificate as a certified public accountant issued by, or under the authority of, another state or political subdivision of the United States, or who holds a valid and unrevoked certificate as a chartered accountant issued by, or under the authority of, a foreign country; provided, the applicant has complied with the provisions of this chapter and the rules of the board. The board shall not be required to issue any certificate under the provisions of this section unless:

"(1) The original certificate was secured as the result of an examination which in the judgment of the board was the equivalent of the standard established by it, and,

"(2) The applicant has been engaged in the practice of public accountancy in Florida as a full time employee of a certified public accountant, as defined in this chapter, for a period of two years, and is a resident, having resided continuously in the state for a period of two years, and,

"(3) The state or country issuing the original certificate grants similar privileges to persons holding certificates as certified public accountants issued under the laws of this state, and,

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"(4) The board is otherwise fully satisfied as to the moral and technical fitness of the applicant."

The Board denied seven applications on the following grounds, viz.:

1. As to each of the seven applicants upon the ground that they were not residents of the State of Florida.

2. As to six of the several applicants, upon the additional ground that the states wherein they were originally certified did not grant "similar privileges" to Florida C.P.As. as required by Section 473.19(3).

Petitioners by the instant petition for writ of certiorari assert that the Board unlawfully denied the applications in that:

(1) The denial on the ground of nonresidency is contrary to law, is in direct conflict with the decisions of the Supreme Court, and is in violation of petitioners' rights under the constitutions of Florida and of the United States.

(2) The denial of the applications on the ground of lack of similar privileges of reciprocity to Florida accountants is contrary to fact and law, is in conflict with the decision of the Supreme Court and is in violation of petitioners' rights under the constitutions of Florida and of the United States.

We will first dispose of petitioners' contentions that the action of the Board is "... in violation of petitioners' rights under the Florida and United States Constitution." A concise definition of reciprocity is set out in Words and Phrases, Volume 36, Permanent Edition, viz.: "'Reciprocity' denotes mutuality, or the relationship existing between states when each gives citizens of other certain favors or privileges

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that its own citizens enjoy at hands of other state; and applicant for certificate of registration as professional engineer has no vested right to have board issue him certificate merely because he held certificate of registration granted him by proper authorities in another jurisdiction." Also see Spindel v. Jamison (Va. 1958), 103 S.E. 2d 205, 208. Thus, it is apparent that the reciprocal certificates as outlined in the quoted statute are "privileges", as distinguished from "rights", which privileges have been authorized by the grace of the sovereign state of Florida. It necessarily follows that the grant of such privileges by the sovereign does not create a constitutional right in the applicants to practice their profession of accountancy in the state of Florida under Chapter 473, Florida Statutes.

We must go to the question of whether the denial of the Petitioners' applications for reciprocal certificates on the ground of nonresidency is contrary to fact and law. Petitioners take the position that Mercer v. Hemmings,[1] as a matter of law, struck "residence" as a prerequisite for qualifying under the statutory reciprocity provision and concluded that the Board cannot consider such condition in weighing "similar privileges" as set out in the statute authorizing the granting of reciprocal certificates. Such a contention cannot be sustained. In short, the Board has construed the reciprocal statute to mean that it authorizes the granting of a certificate to an applicant who was originally certified in another state if that state would do likewise for a Florida certificate who is in a similar situation. If such criteria is not met, the Board is well within its discretionary power to [illegible] reciprocity, and we find in this record competent substantial evidence to sustain the finding of the Board.

[illegible] 180 So. 2d 78 (Fla. 1964).

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Appellees argue in their brief that the Supreme Court expressly held in Mercer v. Hemmings that petitioners should have a "... reasonable opportunity to qualify, under either the reciprocity or examination provisions of the statute without regard to residence or clerkships thereof ..., for registration in this State as certified public accountants." In all candor, the Mercer opinion seems to point to such a construction; however, such construction would compel us to hold that the Supreme Court struck down Subsection 473.19(3), Florida Statutes, pertaining to "similar privileges" for Florida residents. For example, if we should hold, as petitioners insist, that a Missouri accountant shall be admitted under the reciprocal privileges of the statute without regard to residence, we would place such applicant in a superior position to that of a resident of this State.[3] The practical result of such a holding would require the Board to authorize a Missouri accountant to practice in Florida without ever moving to this state or working in this state, while Florida accountants would be compelled to move to Missouri, or practice there, or join a Missouri accounting firm before being eligible for certification in that state.[4]

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[3]Other states from which the applicants were originally certified are New York, California, Massachusetts, New Jersey, and Pennsylvania. Each of these states do provide for reciprocity. Residence or practice within the state are major factors in the granting of reciprocal certificates in each of the states in which the several applicants were originally certified.

[4]§ 326.060, Missouri Revised Statutes, 1969, provides: "Individuals who apply for certificates as certified public accountants shall, except as otherwise herein provided: (1) Be citizens of the United States; (2) Be [illegible] years of age; (3) Be [illegible] of this state by [illegible] public accountancy, or in the employment of [illegible] public accountant, or a public accountant practicing within this state, [illegible] years [illegible] Provided, That [illegible] dispense with the requirement of examination, and issue a certificate

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We decline to give such application to the decision in Mercer.

Certiorari denied.

CARROLL, DONALD K., and JOHNSON, JJ., CONCUR.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1964

HUGH MILLER MERCER, et al., individually and as partners doing business under the firm name of Price Waterhouse & Co., and JIM WALTER CORPORATION, a Florida corporation, *Appellants*, *vs.* ARTHUR I. HEMMINGS, et al., as members of and constituting the Florida State Board of Accountancy, *Appellees*.	CASE No. 32,967

Opinion filed July 29, 1964

An Appeal from the Circuit Court for Alachua County, John A. H. Murphree, Judge.

Cromwell A. Anderson, Louis S. Bonsteel, and Smathers and Thompson, for Appellants.

Chester Bedell, for Appellees.

ROBERTS, J.

This case is before us on direct appeal from a final decree upholding the validity of Chapter 473, Florida Stat-

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utes, relating to the practice of public accounting in this state, and Rule 20-9.03 promulgated by the Florida State Board of Accountancy ("the Board" hereafter), as against the attack on constitutional grounds made thereon by the appellants. Jurisdiction of the appeal attaches under Section 4(2) of Article V of the Florida Constitution.

The decree was entered in a suit for declaratory relief brought by the appellants, as partners doing business under the firm name of Price Waterhouse & Co., and their client Jim Walter Corporation, a Florida corporation doing business in several other states. The partnership is composed of some 130 certified public accountants, each of whom is authorized to practice as a certified public accountant in one or more states of the United States. None of them, however, holds such a certificate in this state, nor do any of them reside in this state.

The firm, which is one of the oldest and largest in this country, has performed accounting work in Florida since 1906. Since 1931, however (the year in which our statute providing for the examination and licensing of "certified public accountants" was adopted, Ch. 15637, Laws of Florida, Acts of 1931) its accounting work here has been limited to the fulfilling of specific engagements entered into outside the state, under 90-day temporary certificates issued by the Board as authorized by Section 473.14, Fla. Stat. From a modest thirteen in 1948, the number of such temporary certificates issued annually to the firm had increased to 69 issued in 1960. In that year, an office (referred to by appellants as a "work space") was established in Miami, with a manager and several assistants—all licensed by other states as certified public accountants—who with their families took up residence in Florida and devoted full time to the firm's accounting business for Flor-

ida clients. In 1961, 88 specific engagements, requiring the same number of temporary certificates, were undertaken in this state; and in January of 1962 an additional "work space" was established in Tampa.

In establishing such "work spaces", the appellants carefully avoided giving the appearance of holding themselves out to the general public in this state as being licensed under Florida law to practice as Florida certified public accountants. Their firm name was not placed on their office door nor in the building directory, nor was it listed in the telephone directory. The resident employees were not listed in any directories as certified public accountants nor (except in one unauthorized instance) as employees of Price Waterhouse. The letterheads of the Tampa and Miami offices show only a post office box number, and the telephone was answered by repeating part of the telephone number. Despite their attempt at anonymity, however, their "specific engagements" in this state increased to 134 during 1962 (including some that were acquired through their local Miami attorneys), requiring two managers at each of the offices and additional assistants (ten in the Miami office alone, all of whom were out-of-state certified public accountants) who resided in the local area and worked full-time for the appellants in the area.

The situation apparently first became known to the Board in July of 1962 when one of the managers of the Miami office applied to the Board for a reciprocal certificate to practice as a certified public accountant in this state, as authorized by Section 473.19, Fla. Stat. One of the requirements for the issuance of such a reciprocal certificate is that the applicant "has been engaged in the practice of public accountancy in Florida as a full time employee of a certified

public accountant, as defined in this chapter, for a period of two years, and is a resident, having resided continuously in the state for a period of two years . . ." The applicant stated in this application that he had been so engaged for the requisite period, having been employed by the appellants, Price Waterhouse. The Board denied his application and immediately adopted Rule 20-9.03 as an "emergency" measure without notice to the appellants.

The portion of the rule objected to by appellants reads as follows:

> "(3) The Board shall ascertain that the engagement for which an application is made is a specific engagement for which a temporary certificate may be issued, and does not constitute, and is not in conjunction with other engagements for the purpose of establishing, a full time practice of public accounting in the State of Florida. *Temporary certificates will not be issued to firms or persons maintaining a full time staff in the State of Florida, and using facilities for full time practice of public accounting as distinguished from fulfilling specific engagements under temporary certificates.*" (Emphasis added.)

The statutory provision relating specifically to the issuance of temporary certificates to out-of-state certified public accountants, Section 473.14, provides that

> "The board may, in its discretion, adopt rules and regulations providing for the issuance of temporary certificates to persons for the purpose of enabling such persons to fulfill specific engagements or employments for which they entered into beyond the limits of the state. "No such temporary

certificate shall be valid for more than ninety days after its issuance, and no certificate shall cover more than one engagement, and no such certificate shall be issued to any firm or copartnership unless all of the members thereof hold certificates as certified public accountants issued under the laws of another state* * *."

The instant suit for declaratory and injunctive relief was then filed by the appellants. The Board answered and filed a counterclaim praying that the court enjoin the appellants from practicing as certified public accountants in this state except under certificates as may be issued by the Board.

Trial was had of the issues made, and extensive depositions and numerous exhibits in support thereof were introduced in evidence, upon the basis of which the Chancellor held, inter alia, that the provisions of Chapter 473 requiring out-of-state certified public accountants to obtain certificates from the Board as a condition precedent to practicing in this state, are within the police power of the State and are not susceptible to the attack on constitutional grounds made upon them by the appellants; that the residency requirements of Chapter 473 for permanent certificates by examination and reciprocity "do not discriminate in favor of residents and against non-residents and are not invalid upon the grounds or for any of the reasons asserted by the plaintiffs"; and that Rule 20-9.03, supra, "is in keeping with the intent of Chapter 473" and not invalid on the grounds or for any of the reasons advanced by the appellants. The relief prayed for by the appellants was denied and that counterclaimed for by the Board was granted. This direct appeal followed.

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On this appeal the appellants argue that Rule 20-9.03 is inconsistent with the mandate of this court in Florida Accountants Association v. Dandelake, Fla. 1957, 98 So. 2d 323; that it is repugnant to Section 473.14, supra; and that it is without basis in the Florida police power. Their attack on constitutional grounds—against the Rule and against Section 473.14 and Chapter 473, if the Rule is held to be in keeping therewith—is summarized in their brief as follows:

> "It arbitrarily interferes with appellants' freedom of contract and rights of property in the practice of their profession and, therefore, is in violation of the Due Process Clause. It imposes an unjustifiable burden on interstate commerce and discriminates in favor of Florida Certified Public Accountants and Public Accountants at the expense of the interstate commerce in which appellants and their clients are engaged and, therefore, is in violation of the Commerce Clause. Finally, it discriminates irrationally between Florida Certified Public Accountants and nonresident Certified Public Accountants and, therefore, is in violation of the Equal Protection Clause."

In support of the contention that they cannot, consistently with Dandelake, be required to have Florida licenses as certified public accountants in order to maintain offices, staffed by full-time employees, in which to perform their accounting services, appellants argue that Chapter 473 as construed by this court in Dandelake is essentially a "holding out" statute, the purpose of which is "to protect the members of the Florida public from misrepresentation as to licensing by the state agency in the field of accountancy."

They urge that they do not hold themselves out to the general public in Florida as a firm of *Florida* certified public accountants, and therefore should not be required to comply with our certification requirements, any more than the accountants doing routine accounting work, involved in Dandelake, were required to do so.

This ingenious argument overlooks the fact that the appellants are, in fact, performing work *as certified public accountants* in Florida through employees residing and working full-time in this state. The fact that they do not advertise themselves as such to the *general* public in this state does not mean that they are not offering their services as such to a selected clientele—and one which, as noted above, is sufficient to require a large staff of full-time resident employees and "work spaces" in two of the largest cities of this state. Nor, apparently, were they averse to accepting work acquired through Florida contacts, since the record shows that several new accounts were obtained through the firm's Miami attorneys.

We held in Dandelake that accountants doing routine accounting work who do not hold themselves out as certified public accountants, licensed or registered by the Board, could engage in their profession in this state. We also, in effect, affirmed the decision of this court in Heller v. Abess, 1938, 134 Fla. 610, 184 So. 122, that the business or profession of accountancy is charged with a public interest sufficient to justify legislation providing for the registration of accountants and prohibiting the practice of accountancy in this state as a *certified public accountant* without a certificate as such from the Board. We find nothing in Dandelake that is inconsistent with a requirement that a firm, such as Price Waterhouse, which engages in the activities shown

by this record to have been performed by it, should be subject to the same certification requirements in Florida as a Florida firm engaging in similar activities. Accordingly, the contention that Dandelake requires a different holding cannot be sustained.

Their contention that the Rule "is even repugnant to the very statute on which it is purportedly based", Section 473.14, is likewise without merit. Section 473.14 merely specifies the circumstances in which out-of-state certified public accountants may fulfill specific, and temporary, engagements, the contracts for which were entered into beyond the limits of the state. Clearly, there is nothing in this provision indicating an intention to accord to out-of-state certified public accountants the privilege of engaging on a year-round basis, through permanent offices staffed by full-time employees residing in this state, in the practice of accountancy, as certified public accountants, in this state. Accordingly, this contention cannot be sustained.

This brings us to the attack on constitutional grounds made against the Rule and the statute by the appellants. Their position is that, despite the fact that none of them holds a license to practice in Florida as a certified public accountant, "the plaintiff partners have had and now have the constitutional and legal right to continue to engage in the occupation and business of accountancy in the State of Florida and the constitutional and legal right to continue to render accounting services in this state to or for any and all corporations, firms and individuals by which or by whom they have been or shall be employed to render such services." (The quotation is from their complaint filed in this cause.) The constitutional basis for such contention was quoted above, and involves the due process, equal protection, and [illegible] clauses of the federal constitution.

The gist of their argument under the due process clause is that the Rule was obviously motivated not by valid police power considerations but by selfish private economic advantage, and for these reasons it "arbitrarily interferes with appellants' freedom of contract and abridges their rights of property, and cannot stand under the Due Process Clause." The short answer to this is that the regulation of the practice of public accounting in this state, in its requirement for certification of those who engage in the practice as certified public accountants, has been upheld as a proper exercise of the police power. Heller v. Abess, supra, 184 So. 122; Florida Accountants Association v. Dandelake, supra, 98 So. 2d 323. A great majority of the courts of other jurisdictions so hold. See the cases collected in the annotation in 70 A.L.R. 2d 433.

It is well settled that, if otherwise valid, the motives of the adopters of a statute or rule are not relevant. An interesting comment on this principle of law was made by the U. S. Supreme Court in Goesaert v. Cleary, 1948, 335 U. S. 464, in upholding a Michigan statute prohibiting women from serving as bartenders and exempting from the legislative prohibition the wives and daughters of tavern owners. The court said:

> "We cannot cross examine either actually or argumentively the mind of the Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."

In Heller v. Abess, supra, we noted that statutes regulating occupations and professions to conserve the public

welfare may be declared to be a deprivation of property and contract rights without due process of law "only when the regulation is arbitrary and unreasonable or oppressive as it adversely affects such life, liberty and property rights." Since, as noted, the provision of Chapter 473 in question was upheld by the court in that case, the appellants' contention under the due process clause cannot be sustained.

The main thrust of appellants' attack on the Rule and the statute is on commerce clause grounds, their contention being that the practice of accountancy, as engaged in by them, is in interstate commerce; that they have the constitutional and legal right to engage in the occupation and business of accountancy in this state in connection therewith; and that the prohibition against their activities in this state made by the Rule (and by the statute, if the Rule is in keeping therewith) directly burdens and discriminates against interstate commerce, contrary to Section 8, Article I, of the United States Constitution.

Insofar as the Rule and the statute have the effect of making it necessary for the appellants to obtain Florida certification as a pre-requisite to continuing their full-time practice of accountancy in this state, the attack on commerce clause grounds cannot be sustained. It is now well settled that a state may require a license and a reasonable fee from out-of-state concerns doing business within its borders, as well as [illegible] with provisions designed to assure [illegible] in dealing with its citizens, even though such [illegible] engaged in interstate commerce. See Meyers [illegible] 71 S. W. 2d 368, 54 A. L. R. 2d 868; [illegible] 313 U. S. 100. Cf. McInerney v. [illegible] 343 U. S. 32, 72 S. Ct. 526, 96 L. Ed. 2d 468, 481. As stated in Robert[illegible] (1946), 328 U. S. 440, 458:

"But we are far beyond the time when, if ever, the word 'license' per se was a condemnation of state regulation of interstate business done within the state's borders. * * * For the commerce clause is not a guarantee of the right to import into a state whatever one may bring, regardless of the effects upon the local community. That is true whether what is brought in consists of diseased cattle or fraudulent or unsound insurance."

And it is settled in this state, as well as in other jurisdictions, that a state has a legitimate interest in regulating a highly skilled and technical profession such as public accountancy. This being so, the standards of proficiency which must be met in order to be registered and to practice in this state as a certified public accountant should, logically, be met by out-of-state persons or firms as well as by local persons and firms. To sustain the appellants' contention that out-of-state certified public accountants should be given *laissez faire* to perform unlimited engagements as certified public accountants in this state without regard to our standards of proficiency, and completely independent of the Board and its licensing requirements, would not only be grossly unfair to our resident public accountants who are required to comply therewith, but would inevitably result in a lowering of such standards. This was the view of the U. S. Supreme Court in a somewhat analogous situation, involving a statute regulating the insurance business. In Robertson v. California, supra, in holding that such statute was applicable to out-of-state insurance companies doing business in California, the court said, 328 U. S. at page 446:

"In short, the result would be ultimately to force all of the states to accept the lowest standards for com-

ducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably, this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the Southeastern decision dictates such a result."

The contention of the appellants, on equal protection grounds, is so obviously without merit as to warrant no discussion.

It must be held, therefore, that the decree here reviewed correctly held that the provisions of Chapter 473 requiring out-of-state certified public accountants to obtain certificates from the Board as a condition precedent to practicing in this state, are immune to the attacks made upon them by the appellants.

But it is one thing to say that out-of-state certified public accountants must comply with the certification requirements to practice as certified public accountants in this state; it is another to hedge the application for such certificates with such residence and clerkship requirements as to make it impossible for an out-of-state certified public accountant to comply therewith.

The purpose of our statute, Ch. 473, is to make sure that only those persons who meet the high standards of proficiency established by the statute and the Board may practice as certified public accountants in this state. If the examination and the standards of the state in which an out-of-state certified public accountant was originally certified are the equivalent of those of this state, there would appear to be no valid reason for requiring, as a pre-requisite to the issuance of a reciprocal certificate, that the applicant therefor meet the residence and clerkship requirements of Section

473.19(2), Fla. Stat. Nor does it appear to be reasonably necessary, to accomplish the purpose of the Act, to require out-of-state certified public accountants who cannot comply with the reciprocity provisons of the Act and who desire to qualify, by examination, to practice in this state as certified public accountants, to meet the residence and clerkship requirements of the Act, Section 473.08.

We hold, therefore, that the contention of the appellants with respect to the impact of the Rule upon the Act, as a whole, in making it virtually impossible for them to practice as certified public accountants in this state, is well taken; that the Rule cannot constitutionally be applied to appellants, under the requirements of the Act as presently written; and that the appellants should be allowed to continue to engage in the practice of accountancy under temporary certificates to fulfill specific engagements until such time as they have a reasonable opportunity to qualify, under either the reciprocity or examination provisions of the statute—without regard to residence or clerkship requirements thereof—for registration in this state as certified public accountants.

The decree reviewed is affirmed in part and reversed in part and the cause remanded for the entry of a decree in accordance with the opinions herein expressed.

It is so ordered.

DREW, C. J., THOMAS, THORNAL, O'CONNELL, ERVIN and HOBSON (Ret.), JJ., concur

Appendix A

FINAL DECREE

This cause came on for trial before the Court upon the issues made by the plaintiffs' complaint, the defendants' answer, defendants' counterclaim against the plaintiff partners and their reply to the counterclaim. By agreement of counsel, numerous and extensive depositions were introduced, subject to objections made by counsel for defendants during the taking of the depositions. Numerous exhibits attached to the several depositions were likewise introduced in evidence, subject to such objections as should be stated in writing by defendants. Written objections were later filed, which were considered by the Court, along with plaintiffs' response to those written objections. All such objections are overruled and all of the deposition testimony and exhibits have been considered and given such effect as in law they are entitled to.

Following introduction of evidence at the trial, the Court heard oral arguments of counsel for the respective parties. Thereafter, counsel submitted briefs that have been carefully considered by the Court.

Upon the pleadings and evidence, the Court finds, declares and decrees as follows:

1. Each of the plaintiff partners is a certified public accountant certified by one or more states other than the State of Florida. No one of the plaintiffs is certified by the State of Florida. Each of the plaintiffs is a non-resident of the State of Florida.

2. For some years before the filing of the complaint, the plaintiff partners engaged in performing services in Florida as "public accountants" under temporary certificates issued

by the Florida State Board of Accountancy upon applications filed by plaintiff partners pursuant to the provisions of F. S. 473.14. The number of such temporary certificates increased from 3 in 1955 to 134 in 1962.

3. By 1960 the amount of accounting work being carried on by plaintiff partners had increased to such an extent that they opened an office in Miami, staffed by permanent employees residing in Florida. In 1962 another such office was opened in Tampa. Each of these offices at the time of trial was staffed by two "managers" who were certified public accountants (certified by states other than Florida), several other accountants and secretaries, all of whom were and are permanent residents of either Miami or Tampa.

4. The accounting services that have been rendered by the plaintiff partners in Florida under such temporary certificates, and that are being rendered by plaintiff partners in Florida and in which plaintiff partners' Florida employees are engaged and in which plaintiff partners' Florida offices are used, were not and are not ordinary or routine accounting services such as are or may lawfully be performed by bookkeepers but were and are services that only certified public accountants or public accountants are qualified and eligible to perform, consisting of the examination and auditing of books, statements and other records prepared and kept by others, and the preparation of reports of such examinations and audits, including certificates and expressions of opinions as to the correctness and fairness of the matters certified, and consisting in large part of the preparation and certification of reports and statements to be filed with public agencies of the Federal Government, the State of Florida

and other governmental agencies requiring certification of such statements by independent public accountants as well as the preparation and certification of financial statements to be presented to banks and other lending institutions in connection with applications for loans or extensions of credit. The work performed by these Florida employees was and is performed under the supervision of one or more of the plaintiff partners.

5. When members of the Florida State Board of Accountancy learned of the existence of the plaintiff partners' Florida offices and the extent and manner of carrying on plaintiff partners' accounting business in Florida under the temporary certificates, the Board gave consideration to revising its rules governing temporary certificates and its other rules, and thereafter duly adopted Rule 20-9.03. This rule requires every applicant for temporary certificates to state in a sworn application, and requires that the Board shall ascertain as a condition to granting such application, that the applicant is not maintaining a full-time office and staff in Florida for full-time public accounting practice in Florida, as distinguished from fullfilling specific engagements under temporary certificates.

6. Since adoption of Rule 20-9.03, plaintiff partners have not applied for temporary certificates under F.S. 473.14 and Rule 20-9.03, nor have any of the plaintiff partners applied for a reciprocal certificate from the Florida State Board of Accountancy under the provisions of F. S. 473.19 and Rule 20-9.04, or sought to obtain from the Board a certificate under the provisions of F. S. 473.08.

7. Plaintiff partners contend that by the nature of their operation they are not holding themselves out to the public and assuming to practice as certified public accountants and as public accountants in the State of Florida within the meaning of chapter 473, Florida Statutes, without holding certificates of authority from the Florida State Board of Accountancy. Even if it could be conceded that technically plaintiff partners are not holding themselves out to the public as certified public accountants and as public accountants, and of this the Court has misgiving, certainly it is manifest that they have assumed to practice as such and by so doing are clearly violating the provisions of said chapter.

8. The plaintiff partners are not entitled to practice as certified public accountants in Florida under their certifications in other states without first obtaining appropriate certificates from the Florida State Board of Accountancy.

9. The provisions of chapter 473 requiring that certified public accountants registered in other states obtain certificates from the Florida State Board of Accountancy as a condition to practicing in this state are within the police power of the State of Florida and valid. They are not invalid for any of the reasons or upon any of the grounds asserted by plaintiffs.

10. The residency requirements of chapter 473 for permanent certificates by examination and reciprocity do not discriminate in favor of residents and against non-residents and are not invalid upon the grounds or for any of the reasons asserted by the plaintiffs. Moreover, plaintiffs have not shown themselves to be in position to rely on their asserted invalidity of those provisions.

11. Rule 20-9.03 governing the issuance of temporary certificates is in keeping with the intent of chapter 473 and is in keeping with the intent of chapter 473 and is a valid exercise of the powers committed by that chapter to the Florida State Board of Accountancy and is not invalid on the grounds or for any of the reasons asserted by plaintiffs. Moreover, plaintiffs have not shown themselves to be entitled to rely on their asserted invalidity of that rule.

12. The plaintiff Jim Walter Corporation is not entitled to any relief. Accordingly it is ORDERED, ADJUDGED AND DECREED that as to the plaintiff Jim Walter Corporation the complaint is dismissed.

13. Plaintiff partners are not entitled to the injunctive relief prayed in the complaint or to any relief other than the determinations and declarations by the Court upon the questions presented. The declaratory relief to which plaintiff partners are entitled has been granted by the findings and declarations hereinabove set forth.

14. Defendants are entitled to the relief prayed in their counterclaim and to the injunctive relief hereinafter granted.

15. The plaintiff partners, individually and as partners doing business under the firm name of Price Waterhouse & Co., and their agents and employees, be and they are hereby enjoined and restrained from holding themselves out, or assuming to act as certified public accountants or as public accountants, in the State of Florida, and from practicing as certified public accountants, or as public accountants, and from rendering accounting services in the State of Florida

of the kind and nature that have heretofore been rendered by the plaintiff partners, their agents and employees, under temporary certificates issued by the Florida State Board of Accountancy, except under such certificates as may hereafter be lawfully issued by the Florida State Board of Accountancy.

16. The defendants, as members of and constituting the Florida State Board of Accountancy, and their several and respective successors constituting that Board, shall have and recover of and from the above named plaintiff partners and the plaintiff Jim Walter Corporation the defendants' costs to be taxed by the Court on notice, unless the parties are able to agree and stipulate as to the amount of taxable costs.

DONE AND ORDERED at Gainesville, Alachua County, Florida, this 2nd day of August, 1963.

/s/ JOHN A. H. MURPHREE
JUDGE

Appendix A

IN THE

CIRCUIT COURT OF FLORIDA

EIGHTH JUDICIAL CIRCUIT

IN AND FOR ALACHUA COUNTY

No. 11133-C

HUGH MILLER MERCER, *et al.*,

Plaintiffs,

v.

ARTHUR I. HEMMINGS, *et al.*,

Defendants.

SUPPLEMENTAL DECREE PURSUANT TO MANDATE

This cause came on to be heard upon plaintiffs' motion for entry of a final decree in accordance with the Opinion and Mandate of the Supreme Court of Florida, after notice to counsel for the defendants. Upon consideration of the Opinion and Mandate and the arguments submitted on behalf of the respective parties, it is now ORDERED, ADJUDGED AND DECREED by the Court that the Final Decree entered herein on August 2, 1963, be and the same is hereby amended to conform to the Opinion and Mandate of the Supreme Court of Florida as follows:

1. The last sentence of Paragraph 9 of the Final Decree is hereby stricken.

2. Paragraphs 10, 11 and 16 of the Final Decree are hereby stricken.

3. Plaintiffs may qualify as certified public accountants in Florida by reciprocity under F. S. 473.19, or by examination under F. S. 473.08, and applicable rules of the Florida State Board of Accountancy, without regard to the residency or clerkship requirements contained in F. S. 473.

If appellants do not choose to so qualify, by reciprocity or examination, they must be governed by the provisions of F. S. 473.14 and rule 20-9.03 pertaining to temporary certificates, like all others.

4. The effect of the injunction contained in the Final Decree is hereby stayed until the further order of this Court, after due notice, to allow the plaintiffs to continue to practice in Florida as certified public accountants under temporary certificates to fulfill specific engagements until such time as they have a reasonable opportunity to qualify, under either the reciprocity or examination provisions of the statute—without regard to the residence or clerkship requirements thereof—for registration in this State as certified public accountants.

5. It having been made known to the Court that during the progress of the action Jewell A. Davis, one of the original defendants, has been succeeded by Charles W. Johnson, Jr., and Robert M. Morgan, another of the original defendants, has been succeeded by Benjamin E. James, the said Charles W. Johnson, Jr., and Benjamin E. James be and they are hereby substituted as defendants in the place and stead of Jewell A. Davis and Robert M. Morgan as members of the State Board of Accountancy of the State of Florida.

6. It having been made known to the Court that during the progress of the action certain of the plaintiff partners have retired and certain new partners have been admitted to the partnership, John Bernard Farrell, Richard David Fitzgerald, Howard Lynn Guyett, Casimir Paul Jannis, Percy Walter Pogson, Donald Rappaport, William Henry Shine, Harold Hawthorne Shreckengast, Jr., Frank Everett Small, Bruce Furman Smith, Jack Wayne Wyker, William Young, Robert William Ash, James Agnew Dowsley, Clyde Henry Folley, Robert H. Graves, Paul August Henschen, Edward Joseph Lynott, Jr., Donald Lester McIntosh, Harry Leland Morris, Leon Marion Nad, John Richard Purdy, and Donald Henry Trautlein be and they are hereby substituted as plaintiffs in the place and stead of Robert Milton Griffiths, David Francis Houlihan, Donald Richard Jennings, Alden Conmoran Smith, Richard Sprague Chamberlain, James Woodrow Mathews, Orville Kenneth Pryor, Charles Addison Stewart, and Philo Ralph Zimmerman, as partners doing business under the firm name of Price Waterhouse & Co.

7. In all other respects the Final Decree entered August 2, 1963, shall remain in full force and effect.

8. The parties having agreed to settle the matter of costs between themselves no order is required.

Done and Ordered this 31st day of March, 1965.

/s/ John A. H. Murphree
Judge

Appendix B

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UNITED STATES CONSTITUTION

Article I, Section 8:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 473, FLORIDA STATUTES

§ 473.03

The governor shall appoint five persons, each of whom shall be a resident of the state and shall hold a certificate as a certified public accountant issued by the state board of accountancy of this state, and such persons and their successors in office shall constitute the state board of accountancy and shall have and exercise all of the powers and authority vested by law in said board.

All appointments of members shall be for terms of four years from the termination of the then existing terms. All persons appointed to membership upon said board shall hold office after the expiration of

their respective terms, until their successors are appointed and qualified. All vacancies upon the board shall be filled by appointment by the governor for the unexpired term. No person shall ever be appointed to membership upon such board unless he shall at the time of such appointment be the holder of a certificate as a certified public accountant issued by the board.

§ 473.08

(1) Any person who is a citizen of the United States and a resident of the state, over the age of twenty-one years, of good moral character, and a graduate of a high school with a four years' course of study, or who has had an equivalent education, and who shall otherwise meet the qualifications specified in the rules of the board, shall be entitled to take an examination for the purpose of determining whether or not such person shall be permitted to practice in this State as a certified public accountant, provided such person

(a) is a graduate of at least a four-year accredited college or university course with a major in accounting, or

(b) has not less than three years' experience in the practice of public accounting, or

(c) has been engaged in the occupation of keeping books of account concurrently for more than one individual or business in the state as his sole vocation for a continuous period of at least five years immediately preceding the date of his application to take such examination, and proof of compliance with this provision shall be established in such form as is prescribed by the rules of the state board of accountancy.

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(2) A person who qualifies to take said examination pursuant to provisions of paragraph (a) of sub-section (1) of this section, and who takes and passes said examination, shall not receive a certificate as a certified public accountant and shall not be permitted to practice public accounting in this State until he shall have completed one year of work in a registered accountant's office, or until he shall have successfully completed an additional accredited one year accounting course at an accredited college or university, and proof of compliance with the provisions of this paragraph shall be established in such form as is prescribed by the state board of accountancy.

(3) For the purpose of this section, a resident of Florida is defined as one who has resided in this state for at least two years immediately preceding the filing of his application, and who is legally domiciled in the state.

(4) The provisions of paragraphs (b) and (c) of subsection (1) of this section shall be effective for a period of five years following the date of enactment of this amendment, after which period no person other than a graduate of at least a four-year accredited college or university course with a major in acounting shall be considered as having fulfilled the educational requirements necessary to qualify for an examination for th purposes of determining whether such person shall be permitted to practice as a certified public accountant, except that any person whose application for an examination shall have been approved by the state board of accountancy prior to the termination of said five year period shall be entitled to take such examination at any time or times during the period of five years immediately follow-

ing the termination of the five year period first referred to in this paragraph.

(5) The state board of accountancy shall have the authority to establish the standards for determining and shall determine:

(a) what constitutes an education equivalent to that of a graduate of a high school with a four-year course of training;

(b) what educational institutions offer a four-year accredited college or university course, and

(c) what course taken at such schools constitute a major in accounting, within the contemplation of this section.

§ 473.14

The board may, in its discretion, adopt rules and regulations providing for the issuance of temporary certificates to persons for the purpose of enabling such persons to fulfill specific engagements or employments, the contracts for which were entered into beyond the limits of the state.

No such temporary certificate shall be valid for more than ninety days after its issuance, and no certificate shall cover more than one engagement, and no such certificate shall be issued to any firm or copartnership unless all of the members thereof hold certificates as certified public accountants issued under the laws of another state or certificates as chartered accountants issued under the laws of a foreign country; and no such temporary certificate shall be issued to an individual unless he holds a certificate as a certified public accountant issued under

the laws of another state or country, or a certificate as a chartered accountant issued under the laws of a foreign country. Each person applying for a temporary certificate shall pay to the board the sum of ten dollars, which shall be disposed of as other moneys are required to be disposed of under this chapter.

§ 473.16

It is unlawful for any person holding a certificate as a certified public accountant or a certificate of authority as a public accountant to act as the representative, agent or manager, in the state, in connection with the practice of public accounting, of any person not authorized under the provisions of this chapter to practice public accounting in this state, or of any firm or association of persons, unless each member of such firm or association or persons shall be authorized to practice public accounting in this state under the provisions of this chapter; provided, that any certified public accountant or firm of certified public accountants residing beyond the limits of the state, who was or were represented on June 25, 1931, in the state by a representative, agent or manager, shall be permitted to continue to be represented in this state by such representative, agent or manager, but no new or successor representative, agent or manager in the state shall be appointed, employed or selected for such certified public accountant or firm of certified public accountants without the approval in writing of the board first being had and obtained.

§ 473.19

The board may, in its discretion, issue a certificate as a certified public accountant to any applicant who

holds a valid and unrevoked certificate as a certified public accountant issued by, or under the authority of, another state or political subdivision of the United States, or who holds a valid and unrevoked certificate as a chartered accountant issued by, or under the authority of, a foreign country; provided, the applicant has complied with the provisions of this chapter and the rules of the board. The board shall not be required to issue any certificate under the provisions of this section unless: (1) The original certificate was secured as the result of an examination which in the judgment of the board was the equivalent of the standard established by it, and, (2) The applicant has been engaged in the practice of public accountancy in Florida as a full time employee of a certified public accountant, as defined in this chapter, for a period of two years, and is a resident, having resided continuously in the state for a period of two years, and (3) The state or country issuing the original certificate grants similar privileges to persons holding certificates as certified public accountants issued under the laws of this state, and, (4) The board is otherwise fully satisfied as to the moral and technical fitness of the applicant.

§ 473.23

Any person:

(1) Who shall use any other term than certified public accountant or the abbreviation C. P. A. to indicate that he is a public accountant with a specially granted title; or

(2) Who shall announce by printed or written statement that he holds any membership in any society, as-

sociation or organization of professional public accountants, unless such society, association or organization has been officially recognized by the board; or

(3) Who shall, when practicing as a member of a firm, announce either in writing or by printing, or represent verbally, that the firm is practicing as "Certified Public Accountants", unless all members of the firm are holders of valid and unrevoked certificates as certified public accountants issued by the state board of accountancy of this state; provided, that any person holding a certificate in good standing as a certified public accountant or as a public accountant granted by the state board of accountancy of this state, when acting as a representative, partner or manager of an individual or firm, properly qualified to practice public accounting under the laws of a state, or states, other than Florida, may hold out to the public that such individual is or that such individals are, so qualified; or

(4) Who shall attempt to practice public accounting under an assumed name, or in the name of a corporation; or

(5) Who shall, as a member of a firm, announce either in writing or by printing, or represent verbally, that the firm is practicing as "Public Accountants", unless all members of the firm are holders of certificates of authority to practice as public accountants or certificates as certified public accountants within the meaning of this chapter; provided, that any person holding a certificate in good standing as a certified public accountant or as a public accountant granted by the state board of accountancy of this state, when acting as a representative,

partner or manager of an individual or firm, properly qualified to practice public accounting under the laws of a state or states, other than Florida, may hold out to the public that such individual is, or that such individuals are so qualified; or

(6) Who shall, as an officer of a corporation, permit it to practice public accounting; or

(7) Who holds himself out to the public as a certified public accountant, or who assumes to practice as a certified public accountant, unless he has received and holds a certificate as such from the board; or

(8) Who holds himself out to the public as a public accountant or who assumes to pracitce as a public accountant unless he has received and holds a certificate of authority from the board; or

(9) Who shall practice, or hold himself out as qualified to practice, as a certified public accountant or as a public accountant after his certificate has been revoked, or during the time that his certificate is suspended; or

(10) Who shall practice as an individual or as a member of a firm, or who shall permit a firm of which he is a member to practice, as a certified public accountant or as public accountant, unless a registration card has been duly secured for the current year in accordance with the provisions of this chapter; or

(11) Who shall sell, buy, give, or obtain an alleged certificate as a certified public accountant or certificate of authority or a registration card in any other manner than as provided for by this chapter; or

(12) Who shall attempt to practice as a certified public accountant or as a public accountant under guise

of a certificate not issued by the board, or under cover of a certificate obtained illegally or fraudulently; or

(13) Who shall knowingly certify to any false or fraudulent report, certificate, exhibit, schedule or statement; or

(14) Who shall attempt by any subterfuge to evade the provisions of this chapter while practicing public accounting; or

(15) Who shall, as an individual or as a member of a firm or as an officer of a corporation, permit to be announced by printed or written statement, or shall represent verbally, that any report, certificate, exhibit, schedule or statement has been prepared by a certified public accountant or by a public accountant when the person who prepared the same was not such certified public accountant or public accountant, except when such person is the employee of a certified public accountant or public accountant, or a firm of certified public accounts or public accountants;

Shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars for each offense or imprisonment in the county jail for a period not exceeding six months.

RULES OF THE FLORIDA STATE BOARD OF ACCOUNTANCY

Rule 20-1.02—Major in Accounting—Course Requirements.

For purposes of Section 473.08(5)(c), the following courses are required for an accounting major within the contemplation of the law:

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Required Accounting Courses

Course Description	No. of Semester Hours	
Elementary Accounting		
Intermediate and Advanced Accounting ..	15	(1)
Cost Accounting, Auditing, Governmental Accounting and Federal Taxation Accounting	12	(2)
Total	27	

Required Related Courses

English (Composition, Literature, Business English, etc.)	9
Economic Theory and Principles	6
Business Law (Contracts, Partnership, Sales, Agency, Bailments, Negotiable In-	

Notes:

(1) An applicant must offer a total of fifteen semester hours in elementary, intermediate and advanced accounting; however, not more than six semester hours shall be acceptable in elementary accounting; moreover, if less than six semester hours are offered by an applicant in elementary accounting, the difference between the total number of semester hours offered by an applicant in elementary accounting and fifteen semester hours must be offered in intermediate and advanced accounting—no specialized accounting courses shall be acceptable as a substitute for any part of the fifteen semester hours required. For example: An applicant may conceivably not possess any college credit in elementary accounting. He may satisfy the fifteen semester hours requirement by offering the necessary courses in intermediate and advanced accounting for a total of fifteen semester hours.

(2) A total of twelve semester hours must be offered for the courses listed. Any applicant who possesses sufficient credits in each of the courses listed to satisfy the minimum requirements for the four courses, but who does not possess the minimum requirements in auditing, two courses in cost and federal taxation accounting, may substitute hours

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Course Description	No. of Semester Hours	
struments, Corporations, Insurance, etc.)	6	
Business and/or Public Finance	6	(3)
(The hours required under this provision are six hours in any of the following subjects: Corporation Finance, Investments, Money and Banking, Taxation, Governmental Finance or Business Finance.)		
TOTAL	27	
TOTAL SEMESTER HOURS REQUIRED	54	(4)

Rule 20-9.03—Temporary Certificates

(1) Applications for certificates to fulfill specific engagements or employments, the contracts for which were entered into beyond the limits of the State of Florida, will be received by the Board, from persons or firms who do not hold certificates from the Board, but who do hold valid certificates as Certified Public Accountants issued under the laws of another State, or certificates as chartered accountants issued under the laws of a foreign country.

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(3) The six semester hours required under this provision may be complied with by offering a total of six semester hours in any of the subjects named, but no subject or course shall be acceptable that is for less than two semester hours credit.

(4) Applicants for the Certified Public Accounting Examination are forewarned that the course requirements as outlined above for the purpose of constituting a major in accounting as prescribed by the Board are considered as the minimum requirements as a prerequisite for the examination and course substitutions will not be permitted.

(2) Applications for certificates to fulfill specific engagements or employments shall be in writing directed to the Secretary of the Board on forms prescribed by the Board.

(3) The Board shall ascertain that the engagement for which an application is made is a specific engagement for which a temporary certificate may be issued, and does not constitute, and is not in conjunction with other engagements for the purpose of establishing, a full time practice of public accounting in the State of Florida. Temporary certificates will not be issued to firms or persons maintaining a full time staff in the State of Florida, and using facilities for full time practice of public accounting as distinguished from fulfilling specific engagements under temporary certificates.

(4) Each application shall be accompanied by the sworn statement of the applicant, or if it is a firm, by a partner of the applicant, to the effect that said work qualifies [sic] for a temporary certificate and that the contract was made outside of the State, and that the said applicant is not maintaining a full time office and staff in the State of Florida for full time public accounting practice in the State of Florida as distinguished from fulfilling specific engagements under temporary certificates.

(5) The Board may on its own initiative or upon the request of any applicant conduct a hearing taking sworn testimony of the applicant, or a partner or employee thereof, prior to granting or refusing a temporary certificate.

(6) Temporary certificates shall be signed by the Chairman and Secretary of the Board. Each year, a list

of all temporary certificates issued shall be entered in the minutes of the Board.

Rule 20-9.04—Reciprocal Certificates

(1) The Board may, in its discretion, issue a certificate as a Certified Public Accountant to any applicant who holds a valid and unrevoked certificate as a Certified Public Accountant issued by, or under the authority of, another state of political subdivision of the United States, or who holds a valid and unrevoked certificate as a chartered accountant issued by, or under the authority of, a foreign country, provided the applicant shall have met all of the requirements enumerated in 473.19, F. S. and shall have demonstrated to the satisfaction of the Board that at the time his original certificate was issued he could have met the educational requirements then in effect in the State of Florida for the issuance of a certificate as a Certified Public Accountant.

(2) Notwithstanding the applicant's inability to meet the residence and experience requirements enumerated in 473.19, F.S. the Board may, in its discretion, issue a certificate by reciprocity to an applicant holding a valid and unrevoked certificate as a Certified Public Accountant issued by, or under the authority of, another state or political subdivision of the United States and who meets the requirements enumerated in 473.19(1), (3) and (4), F.S. provided:

(a) Applicant shows (1) that the examination and standards of the state or political subdivision in which his certificate was originally issued, including educational and experience requirements, were, at the time his certificate was originally issued, the equivalent of those of the State of Florida in effect on the date of the

application for certificate by reciprocity, and (2) that, on the date of the application for certificate by reciprocity, the applicant is a citizen of the United States and a bona fide resident of the State of Florida, or

(b) Applicant shows (1) that the examination of the state or political subdivision in which his certificate was originally issued was the equivalent of the examination of the State of Florida on the date of issuance of applicant's original certificate, (2) that applicant meets the educational requirements of the State of Florida for certification by examination in effect on the date of the application for certificate by reciprocity, (3) that applicant has been engaged in the practice of public accounting in the United States for a period of two years as a full-time employee of a Certified Public Accountant or under the applicant's own certificate issued by such other state or political subdivision, and (4) that, on the date of the application for certificate by reciprocity, the applicant is a citizen of the United States and a bona fide resident of the State of Florida.

(3) Applications for reciprocal certificates to be issued under Section 473.19, F.S. and the provisions hereof, shall be submitted on application forms to be furnished by the Board, and must be accompanied by a fee of $150 to cover costs of processing, investigation, etc. (Amended April 2, 1965, effective May 20, 1965, and still in effect at the time of the decisions below.)

Rule 20-10.01—Unlawful to Act as Representative or Agent

Subject to the proviso expressed in Florida Statutes, Section 473.16, it is unlawful for any person holding a certificate as a certified public accountant or as a

public accountant to act as representative, agent or manager, in this State, in connection with the practice of public accounting, of any person not authorized under the provisions of Chapter 473, Florida Statutes, to practice public accounting in this State, or of any firm or association of persons, unless each member of such firm or association of persons shall be authorized to practice public accounting in this State under the provisions of Chapter 473.

Rule 20-10.02—Must Maintain Own Identity and Independence

Persons holding certificates as certified public accountants or as public accountants under the provisions of Chapter 473, Florida Statutes, may act as correspondents in the performance of public accounting services in this State for clients of non-resident certified public accountants or public accountants who are not holders of certificates authorizing them to practice public accounting in this State, provided that in every such instance where the person or persons holding a certificate or certificates issued by this Board who shall act or assume to act as such a correspondent, such person or persons shall maintain his or their own identity and independence and no person assuming or undertaking to act as such a correspondent shall expressly or impliedly agree or assume, under the guise of a correspondent relationship, to act as a representative, agent or manager or partner or joint-venturer in the practice of public accounting in this State, of any person who is not or any persons who are not authorized under the provisions of Chapter 473, Florida Statutes, to practice public accounting in this State.

Appendix B

Rule 20-10.03—Criteria for Determining Legality of Relationship

Whether a person is an agent or an independent contractor for another depends on the facts and circumstances relating to the formation of the relationship and the carrying on of the work, rather than the denomination attributed to the relationship by the parties. If the facts and circumstances indicate that the purpose of the relationship was or is to enable persons not holders of Florida certificates to carry on a full-time practice of public accounting in this State through a Florida correspondent, the relationship will be regarded as a subterfuge condemned by Section 473.23 (14), Florida Statutes, and unlawful. If by the terms of an express agreement a party to a correspondent relationship not holding a Florida certificate is entitled to exercise control over the policies or operations of the Florida correspondent or if in the carrying on of the work the party not holding a Florida certificate does in fact exercise control over the policies and operations of the Florida correspondent, the Florida correspondent will be regarded as an agent rather than as an independent contractor. In determining whether the purpose of the relationship is unlawful and whether the relationship is one of agency or of independent contractor, consideration will be given to the following:

(1) The financial interest, if any, of one correspondent, or some member thereof, in the business or assets of the other.

(2) The financial obligation, if any, by one correspondent, or by one or more members thereof, to the other correspondent, or some one or more members thereof.

(3) The arrangement for compensation for work undertaken by one correspondent for the other or for the other's clients, e.g., whether on a time basis, flat fee basis, percentage basis or otherwise; whether profits or losses are to be shared, etc.

(4) The existence or non-existence of an obligation by either party to forward business to the other.

(5) The frequency of forwarding business by one party to the other and the volume and extent of the business forwarded as bearing upon the possible dependency of one party upon the other.

(6) The existence or non-existence of a partnership relationship between the Florida correspondent or one or more members thereof, and the non-resident correspondent, or one or more members thereof.

(7) All other facts and circumstances bearing upon the purpose of the relationship or the degree of control that either party may exercise or be entitled to exercise over the policies or operations of the other.

Rule 20-10.04—Notification of Board

Every person holding a certificate as a certified public accountant or as a public accountant under the provisions of Chapter 473, Florida Statutes, who is presently a party to or who shall hereafter enter into a permanent or continuing correspondent relationship with any non-resident certified public accountant or public accountant who does not hold a certificate authorizing him to practice public accounting in this State, shall promptly notify the Board of such relationship and furnish the Board with a copy of the documents evidencing such relationship, and in cases where such rela-

tionship is not evidenced by writing, shall furnish the Board with a written statement summarizing the details of the relationship. Every such person shall also furnish to the Board a statement of the facts relating to the factors referred to in Section 20-10.03(1) through (7) and such additional information as may be requested by the Board. Every such person shall promptly notify the Board of any modification in the relationship with respect to which previous notice has been given, at the same time furnishing the Board with a copy of the documents evidencing such modification and in cases wherein the modification is not evidenced by writing, shall furnish the Board with a written statement summarizing the details of the modification.

Appendix C

IN THE

SUPREME COURT OF FLORIDA

HERMAN W. BEVIS, et al., individually and as partners doing business under the firm name of Price Waterhouse & Co., Petitioners, —*against*— MARK W. EASTLAND, et al. Respondents.	Case No. 35,360

PETITION FOR REHEARING AND OTHER RELIEF

Price Waterhouse & Co., as such and by its individual partners (Price Waterhouse) petitions the Court for a rehearing and appropriate modification or clarification of the Court's opinion filed November 23, 1966, in the above-entitled cause. Because that cause was decided together with *Mercer* v. *Hemmings*, both causes involving as the Court recognized common questions of law and fact, and because the grounds for rehearing are related to the determinations in both, we have this day filed a substantially identical petition in *Mercer* v. *Hemmings*. The grounds in support of this petition are as follows:

I. ***The Court's suggestion that Price Waterhouse can satisfactorily perform the required auditing services for its interstate clients by "purchasing" Florida accounting services from an independent Florida-certified contractor is not feasible.***

Appendix C

The Court in its first opinion in *Mercer* v. *Hemmings* held that Price Waterhouse was not entitled to obtain temporary certificates authorizing year-round staff and facilities in Florida required to service the needs of its many interstate clients; it also stated, however, that Chapter 473 could not be hedged, on the grounds unrelated to proficiency, so as to make it virtually impossible for nonresident accountants such as Price Waterhouse to comply therewith.

However, the practical effect of this Court's recent decision in this cause, taken together with the decision in *Mercer* v. *Hemmings*, is to make it impossible for Price Waterhouse to practice regularly in Florida irrespective of proficiency. The Court has sustained the validity of F.S. 473.16 and 473.23 in holding that all partners must obtain Florida certificates if the firm is to practice in Florida. Yet all the partners cannot obtain permanent certificates by *reciprocity*, inasmuch as the Board's denial of all seven applications for reciprocal certification so far considered has now been affirmed in this case in an opinion of the Court sanctioning broad discretion in the Board. Nor can the requisite certificates be obtained by *examination*. For the Board has taken the position (Motion to Vacate Stay, pp. 5-6) that the detailed undergraduate course requirements (applicable in Florida only since 1956) of F.S. 473.08, as implemented by Board Rule 20-7.02, bar from examination room many Price Waterhouse partners who completed their particular undergraduate courses twenty or thirty years ago.*

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*In addition, as discussed below, this Court appears to have left open the possibility that residence at the time of applying to take the examination, as distinguished from continuous prior two-year resi-

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Thus, the only resource open to Price Waterhouse in performing its demonstrated substantial volume of Florida work is that suggested in Point 2 of the Court's holding in *Mercer* v. *Hemmings* (p. 13):

> "It is lawful for a person holding a Florida certificate to practice accounting thereunder, accepting employment from Price Waterhouse as a client and selling their work product to Price Waterhouse for use in making the master audit of inter-state clients."

We respectfully submit that the Court has not fully considered the implications of this ostensible alternative of relegating Price Waterhouse to the subcontracting of its Florida work to independent, Florida-certified accountants.

The Court's first opinion in *Mercer* v. *Hemmings* accepted as well taken appellants' fundamental contention that Chapter 473 F.S. could not be "hedged" in such a way as to make it impossible, on grounds unrelated to proficiency, for the Price Waterhouse partners to practice their profession in Florida. It thus was not necessary or appropriate in the subsequent proceedings to elaborate beyond the original record in the Circuit Court as to the drastic impact on Price Waterhouse and its interstate clients if it were to become impossible for the firm to practice regularly in the state and it were thereby to be restricted to the purchase of services from independent Florida accountants. That was especially so since to this day not a single application for reciprocal certificates of the over 140 filed has been denied on a ground having anything to do with nonproficiency.

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dence, remains a valid requirement; if so, such a prospective residence requirement would, of itself, make it impossible for Price Waterhouse to achieve permanent certification unless all of the partners were to move to Florida.

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By reason of this posture of the case at the time of the recent decision, we respectfully suggest that this Court in proposing the "sale" alternative may not have been in a position fully to appreciate the implications of that alternative. As we pointed out on the first appeal to this Court in *Mercer* v. *Hemmings* (Brief, pp. 4-6), Price Waterhouse cannot satisfy the needs of investors, creditors and others utilizing certified financial statements, and cannot accept the requisite responsibility for the auditing work performed, if that portion of the client's business which is in Florida must be audited by an independent accountant or firm of accountants. In that connection, and so that the Court may be fully advised in the premises, we respectfully suggest the Court's attention to the annexed affidavit of Herman W. Bevis, which is incorporated herein and made a part hereof. Said affidavit more fully demonstrates the impracticability from an audit standpoint of the precise alternative now suggested by the Court, particularly in light of the strictures imposed by the prohibitions of F.S. 473.16 and F.S. 473.23 and the implementing Chapter 20-10 of the Board Rules.

For the foregoing reasons, we respectfully submit that the Court should reconsider its opinions in both this case and in *Mercer* v. *Hemmings*, with a view toward re-evaluating the Board's discretion to deny applications for reciprocal certificates and toward limiting the impact of F. S. 473.16 and 473.23 as applied here.

II. *The Court's opinion is unclear as to whether residence is a prerequisite for certification by examination.*

In its first opinion in *Mercer* v. *Hemmings*, the Court repeatedly stated that the members of Price Waterhouse could apply for permanent certificates by way of reciprocity or examination without regard to residence or clerkship.

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The Board filed a petition for rehearing and other relief in which, *inter alia*, it sought clarification as to whether the Court had struck down all residence requirements or only the requirement that residence in Florida shall have continued for two years by the time of application [Pet., p. 3]. Moreover, in the briefs submitted on the second appeal in *Mercer* v. *Hemmings*, and on certiorari in this case, considerable discussion was devoted to the distinction between the requirement that an applicant be a resident at the time he seeks to take the examination or to obtain a reciprocal certificate and the additional requirement that such residence shall have continued over the preceding period of two years.

As a result, this Court's attention was repeatedly directed to two types of residence criteria. In its recent opinion in *Mercer* v. *Hemmings*, however, the Court refers to the "lack of two years of residence" as not operating to prevent an applicant otherwise qualified from taking the examination (Opinion, p. 7), to the requirement for "two years residence in Florida prior to the taking of the examination", and to basking in the Florida sunshine "for a period of two years before taking the examination" (p. 8). Furthermore, the Court's opinion arguably seems to contemplate a prerequisite of Florida residence in referring to "the kind of citizens we want in Florida", "the advantages of Florida residence" and inviting people "to reside here" (p. 8). Finally, the Court expressly holds only that it is unreasonable to require "two years of residence or clerkship" as a prerequisite.

Moreover, this Court affirmed the denial of the application for a reciprocal certificate of petitioner Begeman in this case, notwithstanding that the Board's sole ground for denial of that application was Begeman's nonresidence in Florida (without any consideration as to whether Begeman's state of original certification had a residence require-

ment, which it did not). Since the Court in its first opinion in *Mercer v. Hemmings* treated residence requirements for both reciprocity and examination jointly, the Begeman ruling raises considerable doubt as to whether this Court in its second opinion has validated a residence requirement under F.S. 473.08 as a prerequisite to taking the examination.

We respectfully request, therefore, that the Court clarify its opinion with respect to residence requirements for examination pursuant to F.S. 473.08.

For all the foregoing reasons, it is respectfully submitted that the Court should grant this petition, order a rehearing and vacate or modify its prior decision in this cause. Because of the nature and constitutional significance of the questions involved, it is respectfully suggested that the Court invite further briefs and set the case down for further oral argument.

December 30, 1966.

Respectfully submitted,

HERVEY YANCEY,
CROMWELL A. ANDERSON,
Attorneys for Price
Waterhouse & Co.

SMATHERS & THOMPSON,
Of Counsel.

Appendix C

CERTIFICATE OF SERVICE

I DO CERTIFY that a copy of the foregoing Petition for Rehearing and Other Relief together with the supporting affidavit of Herman W. Bevis has been furnished by mail to Chester Bedell, Esq., 1520 Barnett National Bank Building, Jacksonville, Florida 32202, Attorney for Appellee.

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Cromwell A. Anderson
Of Counsel

Appendix C

IN THE

SUPREME COURT OF FLORIDA

HERMAN W. BEVIS, et al., individually and as partners doing business under the firm name of Price Waterhouse & Co., Petitioners, —*against*— MARK W. EASTLAND, et al., Respondents.	CASE No. 35,360

AFFIDAVIT OF HERMAN W. BEVIS

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HERMAN W. BEVIS, being first duly sworn, deposes and says:

I am Senior Partner of the firm of Price Waterhouse & Co., and I am one of the petitioners in No. 35,360. I make this affidavit in support of the petition for rehearing and other relief in this cause. I have read said petition and the factual matters set forth therein are true to the best of my knowledge, information and belief.

As the petition points out, the effect of the Court's decision is to prevent the Price Waterhouse firm from regularly practicing in Florida. However, the Court in its opinion has suggested an alternative route by which Price Waterhouse

might attempt to satisfy the auditing and accounting needs of its interstate clients operating in part in Florida. With all deference to this Court's efforts to find a solution to the problems presented by the stringency of the Florida statute, I respectfully submit this affidavit to demonstrate that the suggested alternative is not feasible as a matter of sound auditing procedure.

Steadily Increasing Emphasis by Investors and Management on Single Audit Responsibility

1. The United States enjoys the highest standard of living in the world. A considerable contribution to this high standard is made by corporations operating in interstate commerce, typically a corporation consisting of a parent with a number of divisions and separately incorporated subsidiaries operating in different parts of the country. These national corporations have attracted substantial amounts of permanent and short-term capital from investors and creditors. Most of these investors and creditors are sufficiently removed from the corporation that, in deciding whether to supply funds or to continue or discontinue the supply of funds to the corporation, they need credible information, contained in financial statements, about the present financial position and historical results of operations of the enterprise. The attest function of the CPA lends credibility to these financial statements. The primary responsibility for the fairness and completeness of financial communications to stockholders and creditors rests, of course, with a corporation's board of directors and its management. Nonetheless, the CPA firm which attests that these financial statements "fairly present" the financial position and results of operations assumes an important secondary responsibility to those

investors and creditors to whom the CPA firm authorizes distribution of its audit report.

2. A very substantial portion of Price Waterhouse's interstate practice involves corporations subject to the jurisdiction of the Securities and Exchange Commission. A major activity of the SEC is to protect investors by providing for full and fair disclosure of information about registrant corporations, and specifically to fix responsibility for such information. The Commission recognizes in Rule S-X that there may be two or more certifying accountants, and establishes responsibility as among them as follows:

> "*Rule 2-05. Certification of Financial Statements by More than One Accountant.*
>
> If, with respect to the certification of the financial statements of any person, the principal accountant relies on an examination made by another independent public accountant of certain of the accounts of such person or its subsidiaries, the certificate of such other accountant shall be filed . . . ; however, the certificate of such other accountant need not be filed (a) if no reference is made directly or indirectly to such other accountant's examination in the principal accountant's certificate or (b) if, having referred to such other accountant's examination, the principal accountant states in his certificate that he assumes responsibility for such other accountant's examination in the same manner as if it had been made by him.

[illegible] subsidiary portion of a business is audited by [illegible] the Commission requires either (a)

that responsibility run directly from the separate accountants to the investors in the parent company or (b) that the primary certifying firm accept responsibility for the separate accountant's work.

3. It has been the experience of Price Waterhouse, particularly in recent years, that the business and financial community is unwilling to accept the responsibility of a separate accounting firm auditing but a portion of the enterprise and is rapidly centering on fixing the ultimate responsibility for all of a corporation's audit work on the parent's certifying accountants. Increased impetus in this direction has resulted from the recent *Atlantic Acceptance* case in Canada. There, investors and creditors of Atlantic Acceptance appear to have lost tens of million of dollars, the loss traceable largely to one of Atlantic's subsidiaries which was audited by an accounting firm different from the parent company's principal auditors. See, for example, the account of that business disaster in *Barron's Weekly* for August 16, 1965, page 9, copy of which is annexed hereto as Exhibit A.

4. The recent experience of Price Waterhouse in dealing with its own clients has shown that stockholders, directors and management alike wish to pin the responsibility for the fairness of the consolidated financial statements squarely on the parent corporation's auditors. Stockholders at annual meetings have repeatedly inquired as to whether Price Waterhouse, as the auditors of the parent corporation, audited all segments of the business or at least accepted full responsibility for any separate audits. Boards of Directors and audit committees of outside board members have raised even more pointed questions, e.g., as to whether the firm will accept direct responsibility, as auditors for the parent, for

work to be done on recently acquired subsidiaries or divisions theretofore employing another auditing firm or firms.

5. It is in this context, that is, of satisfying the economic need for credible financial data about an enterprise engaged in multi-state commerce, that we must examine the question of fixing responsibility for an independent Florida CPA's audit of a portion of a business.

Impropriety of Principal Auditors' Assuming Ultimate Responsibility for Audit Work "Sold" to Them by Independent Florida Accountants

6. F. S. 473.16 and 473.23 prohibit a nonresident firm from practicing in the State through a representative, agent or manager, and Board Rule 20-10 implements those stringent statutory provisions. The regulatory program thus contemplates that a Florida certified public accountant who deals with a nonresident firm must be independent of that firm in all essential respects. Yet if the Florida CPA, in an audit of a part of a multi-state business, is independent of the out-of-state firm performing the "master audit", then the latter cannot accept responsibility for the Florida CPA's work. This is simply because the out-of-state firm cannot state of its own knowledge that the Florida audit was conducted in accordance with "generally accepted accounting standards". According to the American Institute of Certified Public Accountants ("Statements of Auditing Procedure No. 33, Chapter 2), there are ten "generally accepted auditing standards". These standards have been approved and adopted by the membership of the AICPA and are, therefore, binding on all members (including all the Price Waterhouse partners). Six of those standards are as follows:

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"General Standards

1. The examination is to be performed by a person or persons having adequate technical training and proficiency as an auditor.
2. In all matters relating to the assignment an independence in mental attitude is to be maintained by the auditor or auditors.
3. Due professional care is to be exercised in the performance of the examination and the preparation of the report.

"Standards of Field Work

1. The work is to be adequately planned and assistants, if any, are to be properly supervised.
2. There is to be a proper study and evaluation of the existing internal control as a basis for reliance thereon and for the determination of the resultant extent of the tests to which auditing procedures are to be restricted.
3. Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries and confirmations to afford a reasonable basis for an opinion regarding the financial statements under examination."

7. From the foregoing it will be seen that, to accept complete responsibility for the Florida CPA's work, the out-of-state CPA firm would have to satisfy itself on such matters as the adequacy of technical training and proficiency of persons engaged in the Florida work, their independence

and mental attitude, whether they use due professional care, whether assistants were properly supervised, whether the extent of audit tests were compatible with the client's internal controls and whether sufficient competent evidential matter was obtained. Most of the foregoing conclusions can be reached only by an intimate knowledge of the Florida CPA firm and its personnel, the client's personnel, procedures and records, and, most important, the day-to-day conduct of the audit. Such intimate knowledge is completely incompatible with the "independent contractor" concept.

8. In addition to the foregoing considerations of fixing audit responsibility, particularly those of assuring conformity with "generally accepted auditing standards", there are intensely practical difficulties in the independent contractor concept, especially when dealing, as is so often the case, with parent and subsidiary companies or divisions. These difficulties arise out of the circumstance that the Florida business is only a portion of the whole. Some of these difficulties are as follows:

(a) There are usually many intracompany transactions between the Florida operation and the rest of the enterprise. Good auditing requires that the same firm examine both sides of these transactions. Often the same auditing personnel must cross state lines to do this.

(b) Some of the operations of a company are centrally [illegible]

Effective independent audits of these pieces is impossible; audits of them must be done as a whole.

(c) Most parent companies promulgate company-wide policies, procedures and instructions, both operating and accounting. Seeing that these are adhered to is an important part of an auditor's work in large company audits. While manuals and instruction letters reduce much of these matters to writing, again these often must be supplemented by background and experience of parent company audit personnel moving across state lines to *participate in local audit work*.

(d) Parent company officials and personnel move freely among the operations of their enterprise and have a detailed knowledge of local operations and conditions. They must and do continually discuss with audit personnel, at company headquarters, problems, plans and improvements in outlying areas. This could not be done if Florida audits were conducted by independent contractors.

9. An additional practical problem arises as to the particular manpower and capital needs in servicing large companies. Not infrequently such companies or their parents become new clients of these out-of-state accounting firms or unexpected large special projects are undertaken for existing clients. In both of these cases, sudden and substantial increases in manpower and working capital are often required of the accounting firm. It is a proven practicality, if not a necessity, that Florida CPA firms, as independent contractors, would not be in a position to [illegible] these needs satisfactorily on short notice. [illegible] other hand, with a larger and broader base of [illegible]

and financial resources, can and regularly do meet such situations.

10. In order to assure that the Florida work will be competently and thoroughly handled consistent with the exacting standards demanded by the out-of-state firm's clients, that firm at a minimum must be free to do any and all of the following with respect to the accountants on the local scene in Florida (or for that matter, in any other state):

(a) review and supplement policies and procedures with respect to recruiting, training, supervision and assignment of personnel;

(b) participate in the planning, conduct and review of audit work;

(c) arrange visits, and temporary and permanent transfers, of personnel between national and local operations;

(d) lend and borrow staff; and

(e) provide temporary, and possibly long-term, financial assistance to meet working capital requirements.

Yet such activities plainly conflict with the independent contractor concept established by the statute and implementing Rule.

Compounded Adverse Effect of Multi-State Application of Independent Contractor Concept

11. The foregoing discussion has been based upon the supposition that Florida is the only [illegible] which it

now is—to a firm's integrated national practice throughout the United States. It may be assumed, however, if the public interest in the State of Florida is best served by reserving the practice of accountancy in the State of Florida to Florida CPA firms, that the same approach would equally be in the best interest of the citizenry in each and every other state. The implications of such assumption merit examination.

12. Price Waterhouse alone has as clients more than 200 of the companies listed on the New York Stock Exchange. Most of these companies have multi-state operations, as do many other of the firm's clients not listed on the New York Stock Exchange. It is inconceivable that the audits of the operations of these companies might be carried out by ten, twenty, thirty, forty or fifty different state firms as "independent contractors" to the parent company's auditing firm. Investors, directors and managements would, of course, find it impossible to fix any kind of meaningful auditing responsibility. It would be impossible to coordinate an audit of interrelated interstate operations and transactions. It would be impossible for the parent company auditors to state of their own knowledge that the audits of the various segments had been carried out in accordance with generally accepted auditing standards. It would be impossible for them to state of their own knowledge whether the financial statements fairly presented the financial operations and results of the entire enterprise.

13. The parent company auditor would only be in a position to report on that segment of the whole business which happened to fall within that state in which he is entitled to act as independent contractor. The stockholder

could only get his assurance from some ten, twenty, thirty, forty or fifty certificates of the separate state firms. Even then, the stockholder could not assess relative responsibility among the firms unless the certificates were accompanied with the figures applicable to the business in the respective states and those figures would be nearly meaningless because of the fluidity of interstate operations carried on by most national companies.

14. The possibility of the audits of nation-wide companies being carried out by a host of CPA firms as independent contractors is utterly impracticable. It flies in the face of the manner in which an important segment of economic activity is being carried out today, namely, that of the publicly owned multi-state, national and international corporations. Yet that is a distinct prospect in store if it is permissible for one state to confine the accounting practice to CPA firms in that state which are "independent" of firms of any and all other states. In terms of the adaptation of public accountancy to the economic and social environment, such a development, in 1966, would set public accountancy back to the previous century.

/s/ Herman W. Bevis
Herman W. Bevis

Sworn to before me this
28th day of December 1966.

/s/ [illegible]
Notary Public

[illegible]

Appendix C

Exhibit A

BARRON'S [8/16/65]

AFTER THE FALL

The Collapse of Atlantic Acceptance Has Been a Jolt to Lenders

By F. J. McDiarmid*

As every Canadian schoolboy knows, the Americans burned Toronto during the War of 1812. Perhaps as belated revenge, a corporate citizen of Toronto, Atlantic Acceptance Corp., recently set some fire alarms ringing in a number of leading American financial centers. In Hartford, Conn., all five major life insurance companies were scorched and at least one was badly burned. Beyond the borders of the Nutmeg state, at least 20 other institutional investors also have suffered damage.

Grew Like Topsy

Atlantic Acceptance is a diversified finance company, medium in size by U.S. standards, but large for Canada. Its receivables recently totaled about $150 million. Some 53% of its common stock is owned by Great Northern Capital Corp., an investment subsidiary of Lambert & Co. of New York. Atlantic stock until recently was traded on the Toronto Stock Exchange, but has been delisted. The company was put into receivership in mid-June, owing to its inability to meet a short-term note maturity of $5 million. However, its troubles go much deeper.

Atlantic was an unusual finance company in several ways. To begin with, it grew like Topsy, notwithstanding the

*Mr. McDiarmid is a vice president of a large investment company.

ceivables mounting from $19 million at the end of 1960 to $129 million four years later (and to $150 million by the time of its collapse). While nearly all its loans were made in Canada and payable in Canadian dollars, its term borrowing was done largely in the United States, payable in U.S. dollars. These arrangements may have sprung from New York's control of the stock; they also reflected at least in part Atlantic's inability to sell all the debentures required to finance its rapid growth in Canada.

Impressive List

Finance company debentures, payable in U.S. dollars and yielding 6% or better, and mostly of a senior and allegedly secured status, looked good to no fewer than 30 substantial U.S. and Canadian investors. Therefore, Atlantic was able to accumulate a rather long list of impressive U. S. institutional lenders, mainly drawn from the life insurance fraternity. Canadian term lenders remained relatively light in the Atlantic picture.

For a finance company, Atlantic was short on bank lines, having only one line with a major Canadian bank. It sought to compensate by selling a heavy volume of commercial paper. At the time of its demise, Atlantic had a very long list of commercial paper holders, including some of America's leading industrial companies or their Canadian subsidiaries.

At the time its insolvency was announced, Atlantic owed about $105 million on a senior secured basis. About half of this sum was in the form of term debt, all but a small part held by U.S. financial institutions, largely life insurance companies, and payable in United States dollars. The remainder was largely short-term commercial paper, much of it also held south of the border. It was the latter that

triggered the company's downfall. Pressure on U.S. lenders to keep their money at home for balance-of-payments reasons made it difficult for Atlantic to renew its short-term notes. When it no longer could do so, it went into receivership.

Junior Debt Larger

Besides its senior secured debt, Atlantic has outstanding about $17 million of subordinated term debt, about $14 million in a so-called senior layer and $3 million in a junior layer. This debt also is largely held by U.S. financial institutions. Below the level of the debt as shown on Atlantic's books stood over $5 million of preferred stock, largely held by U.S. and Canadian financial institutions, foundations, or pension funds, and common equity which, including surplus, had a stated value on the books of over $9 million.

In the investment of its assets, Atlantic showed plenty of imagination. At the time of its insolvency, its books revealed about $60 million of sales finance receivables, over half of it motor car paper; about $38 million of small loans; and $52 million of commercial loans. The last-named were largely in a separate subsidiary, Commodore Sales Acceptance Co. and were allegedly the special responsibility of Atlantic's now-resigned president. These were very largely head office loans, not made through Atlantic's 100-odd branches throughout Canada.

In the area of commercial lending the largest losses are likely to occur. One single commercial loan, the largest one made, was for $10 million—an amount larger than the entire stated common stock capital of the company, including surplus. It was made on the security of part of the equity in the Lucayen Beach Hotel in the Bahamas. Other large

commercial loans made by Atlantic promise only small recovery.

Grim Outlook

It is far too early yet to try to assess with any degree of accuracy the extent of the losses which Atlantic's creditors and other investors in the company will suffer. Preliminary information indicates that it will take something of a miracle to get the creditors out whole, including payment of principal and accrued interest, and the premium required for payment in U. S. dollars. This means that the outlook is pretty grim for the preferred and common stockholders. The total losses suffered are likely to be of a magnitude roughly comparable to that of the Billie Sol Estes ammonia tank affair, but not nearly so large as in the case of the salad oil business in New Jersey. In any event, Atlantic Acceptance stands to become the biggest single financial debacle to take place in Canada for many years.

It is not too early to draw some object lessons from the Atlantic fiasco for the future protection of investors in finance companies (and for the guidance of the managements of such companies as use billions of dollars of other people's money). In view of the vast growth in the finance business in the U. S. and Canada during the last 20 years, and also the extent of human frailty, some cracks in the structure were bound to occur sooner or later. The yawning crevasse which has appeared in Atlantic Acceptance is well worth appraising.

Lines of Defense

The investor in finance company securities, in theory at least, has a number of lines of defense. First, there are the experience, ability and integrity of the management, includ-

ing presumably the company's directors. Second, there is the periodic check upon management's activities and results provided by the reports of the auditors. Third, there is the policing power of banks lenders, reinforced by their stability to withdraw their lines of credit on relatively short notice. Fourth, there is trade gossip concerning the operations of the company; that is, what its competitors say about it. It is a sad reflection in the Atlantic case that the first three lines of defense collapsed; only the fourth saved at least one institutional investor from accepting a subordinated position in the Atlantic debt structure a few weeks prior to the crash.

As for the management element in Atlantic, the single speculative loan which exceeded the entire common stock equity of the company speaks loudly enough. Atlantic's rapid growth was achieved partly at least by a policy of speculative lending. In a highly competitive business, rapid growth sometimes may reflect a willingness to do business on terms which competitors have turned down as being too risky.

Liberal Bookkeeping

The liberal bookkeeping practiced by the company was another reflection on management; Atlantic took an unusually large part of its finance income into earnings as soon as it made a loan, thereby increasing immediate profits at the expense of future results. The warning here is that such liberality may penetrate other parts of a company's operations, most specifically in the granting of credit.

And what about the directors of Atlantic, particularly those with a financial background, whom at least some institutional debenture holders regarded as watchdogs on

their behalf? Did they know what was going on? If so, they must share the responsibility of management for the fiasco. If not, they were directors who apparently failed to live up to their responsibilities. The lesson here is that a person should not allow his name to be used in the roster of directors of companies handling large amounts of other people's money, and serving as a magnet for funds, unless he is prepared to act responsibly.

In the finance business, investors willy-nilly are heavily dependent on audit reports. The reason is simply that the assets consist not of land, buildings or tangible things of any kind, but primarily of promises to pay, which quickly can change their quality and nature. Poor management can wreck such a company in a remarkably short time.

The investor in a finance company, even a large and supposedly sophisticated financial institution, is in no position to examine individual receivables. Thus, he must rely on the reports of the auditors who undertake this task and are paid for it. The audit reports on Atlantic Acceptance, prepared by a well-known firm of accountants, furnished scant protection or warning to investors. The audit report for the end of 1964, a few months before the blowup, gave no hint of the hidden dangers.

"In our opinion, which insofar as it relates to the amounts included for subsidiary companies whose accounts have not been examined by us is based solely on the reports of other chartered accountants, the accompanying consolidated balance sheet and consolidated statements of income and retained earnings present fairly the financial position of the companies as at December 31, 1964, and the results of their operations for the year ended on that date, in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding year."

Appendix C

Technical Out

This statement no doubt gives the auditing firm a technical out, for they did not examine at all the books of Commodore Sales Acceptance, which held the commercial receivables (over one-third of the total), and where the principal loss potential seems to lie. In this area they accepted without question the findings of a small, obscure auditing firm, totally unknown to most of Atlantic's creditors. However, the plain inference which most investors would draw from the above quote is that the principal auditors had confidence in the other auditing firm, or that the part of the business covered by that firm was minor. If one cannot assume this much, the audit report would have no meaning since it would contain a hole large enough to drive a truck through. Such in fact was the case.

It is not suggested that the principal auditing firm intended to mislead creditors and other investors in Atlantic. However, the form and content of their reports had the effect of doing roughly that. As a minimum, its reports should have spelled out precisely the areas not covered in the audit and the audit of the firm covering such areas should have been attached. Since the Atlantic fiasco hit nearly all investors in that company as a complete surprise, it is obvious that the audit reports did not fulfil the principal function of such reports, which is to keep investors and other interested parties appraised as to the company's real overall condition and soundness.

Any audit report on a finance company which makes commercial loans should list the amounts of the larger individual loans, and the type of business or industry in which the borrower is engaged. No such list was available to the investors in Atlantic Acceptance. In fact, the last audit report was

a very slim and inadequate document indeed, compared with the audits of most U. S. finance companies.

What should be done about this state of affairs? Since investors in finance companies, particularly institutional investors, must rely so heavily on audit reports, they might be well advised to pay all or part of the auditing fees. In such case the auditor, as their agent, might feel a more direct sense of responsibility toward them. This, of course, might require charging the finance company a little extra interest. If audit reports were thus furnished to large institutional lenders at their cost, on a confidential basis, they could be very specific and detailed on the subject of large commercial loans and the quality of the collateral.

Next comes the matter of bank borrowing. Atlantic had only one substantial bank line. Although its head office is within five minutes' walking distance of the executive office of Atlantic, the institution involved must have done precious little policing since it was caught to the tune of several million dollars. Too much short-term commercial paper in lieu of bank credit was the proximate cause of Atlantic's downfall, though by no means the root of its ills. Commercial paper is the most skittish of all types of capital sources available to a finance company; too great reliance upon it is obviously dangerous.

Deaf Ears

A common practice in more conservative circles is to limit such paper to the amount of unused bank lines available, so that if holders of commercial paper decide to cash in their chips, bank lines will be available to take their place. Atlantic had no such recourse. The urging of some of its debenture

holders that it put some curb on its commercial paper borrowing fell on deaf ears.

It has been common practice for Canadian finance companies to back their senior borrowing by receivables in allegedly good standing equal to 115%, or some such percentage, of the amount of such borrowing. These receivables are deposited with a trustee. As a result, Canadian finance companies have tended to claim freedom from some of the restrictions imposed by lenders on their counterparts in the United States. They have done so on the theory that a pledge of receivables adds to the security of their senior debt.

The Atlantic debacle, however, has blown this theory sky-high. The custodian bank in this case accepted without question, and apparently without checking, the representations of Atlantic's management as to the quality of the receivables pledged. Such pledge now yields no assurance that even the senior security holders of Atlantic will come out whole. Hence it seems inevitable that in future, institutional lenders to Canadian finance companies will put little weight in such a pledge of receivables and will seek to bolster their position by other means, such as the imposition of tight borrowing ratios.

Because of the Atlantic fiasco, Canadian finance companies can expect to face an overhaul of their borrowing and reporting methods, particularly insofar as the adequacy of audit reports is concerned. Such reports should cover the company's entire operations and not leave gaping holes. Some form of public regulation, such as that now borne by insurance companies and banks, may very well be imposed. All of this, however, will provide no substitute for good management and a responsible board of directors.

APPENDIX D

MAJORITY REPORT OF THE FLORIDA STATE BOARD OF ACCOUNTANCY

TO THE

HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA TALLAHASSEE, FLORIDA

May 1, 1967

ANALYSIS OF FLORIDA ACCOUNTANCY LAW AND RECOMMENDATIONS FOR CHANGES THEREIN

Appendix D

(Letterhead of)

STATE BOARD OF ACCOUNTANCY

STATE OF FLORIDA
GAINESVILLE, FLORIDA

MAJORITY REPORT OF THE FLORIDA STATE BOARD OF ACCOUNTANCY

TO THE

HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA TALLAHASSEE, FLORIDA

May 1, 1967

ANALYSIS OF FLORIDA ACCOUNTANCY LAW AND RECOMMENDATIONS FOR CHANGES THEREIN

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I—Introduction

A. *House Resolution*

During the 1965 session of the Florida Legislature, many legislators became aware for the first time of a serious conflict which had developed between large National accounting firms and the accounting profession in Florida. The legislators also became concerned about the litigation then being pressed in the State Supreme Court, challenging the Florida accountancy laws' basic precepts and philosophies relating to non-resident practice, reciprocity, etc. Obviously wishing to avoid passing legislation in the climate of charge and counter-charge, claim and counter-claim, engendered by this conflict, the House requested the State Board of Accountancy to make a study of the accountancy law and submit a report of its study to the 1967 Legislature.

The designation of the Board was made in a Resolution adopted by the House of Representatives on the final day of the 1965 regular session. The pertinent part of the Resolution reads as follows:[1]

> "Be it resolved by the House of Representatives of the Legislature of the State of Florida that the State Board of Accountancy be requested to study in detail and reappraise the present accountancy laws of the State and its rules and regulations in the light of the current business trends and conditions, adopting such changes in regulations as it deems necessary and recommending to this House of Representatives at its next regular session any changes in the law which it may believe will be beneficial to the State and to the accounting profession.

[1] The entire Resolution is reproduced at pages 57-58, "Analysis of House Concurrent Resolution ... Florida Accountancy Law," attached hereto and marked Exhibit A. Throughout this report as much reference as is practical will be made to the exhibits accompanying the report, so that the report itself can be kept as brief as possible.

"BE IT FURTHER RESOLVED that a copy of this resolution be certified to the State Board of Accountancy."

B. *Methods Employed for Study and Implementation*

The Board's approach to carrying out the charge placed upon it by the Legislature was threefold. First, an analysis of the law as presently written, but modified by a series of court decisions was made for the purpose of ascertaining the problem areas. This analysis was informal and consisted principally of a verbal collation by various Board members of their recollections of administrative problems encountered by the Board during their terms. It quickly became apparent that the problem areas were (1) those related to the practice of accountancy by non-residents, and (2) those related to administration, definitions, education, etc.

The second approach was to seek the views of the public, individuals and firms, professional societies, and the business community, on all matters relating to our law and the practice of accountancy thereunder. Again, the methods employed were largely informal and were carried on by the individual Board member through interviews, informal discussions, etc., except for a formal hearing which was held in Jacksonville on December 16, 1966, and at which a number of briefs were submitted.[8]

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[8]Pertinent position statements or other documents submitted at the hearing, or subsequently in reply to documents previously submitted, are attached hereto and identified as follows:

Exhibit A—*Analysis of Issues Concerning Florida Accountancy Law*, submitted by Florida Institute of Certified Public Accountants.

Exhibit B—*Brief for National Firms*, submitted by Mr. Frank A. Graham, Jr. on behalf of six National firms.

Exhibit C—*Reply Brief*, submitted by Mr. Frank A. Graham, Jr. on behalf of the six National firms, replying to Exhibit A.

Appendix D.

The third approach was to adopt such changes in the regulations of the Board as deemed necessary (1) to conform the regulations to the law as interpreted by the Florida Supreme Court, and (2) to improve administrative and regulatory procedures.

II—Problems in the Practice of Accountancy

A. *Present Law*

The present Florida Accountancy Law, Chapter 473 F. S. and the regulations thereunder were compared with the accountancy laws and regulations of all the other states of the United States, as currently reported in the Commerce Clearing House Reporter, "Accountancy Laws." Based upon this study, the Board is of the opinion that the Florida law is the equal of any and superior to most other accountancy statutes in the United States. Naturally, it is not perfect, but neither is it obsolete or incapable of being accommodated to modern conditions, as has been charged by some.

Based on the tenor of the House Resolution and the approach of all persons appearing before the Board, it became obvious that the main problem in the area of the practice of public accountancy was that of the out-of-state firm serving its Florida clientele. Under the present law, out-of-state firms are permitted to service their Florida clientele under the temporary certificate system set forth in Section 473.14 of the Florida Statutes.

Section 473.14 permits an out-of-state firm to practice accountancy in Florida in fulfilling a specific engagement contracted for outside of the State, by securing a 90-day permit from the State Board. The purpose of this section is to permit a Florida business, or person, to avail himself

of the services of the accountant of his choice, regardless of where such accountant might reside. By providing that the engagement for the services must be contracted for outside of the State of Florida, the Florida business or person voluntarily waives the protection afforded him by the high standards required of Florida accountants by the Florida Accountancy Law. Permitting the out-of-state accountant to enter Florida to perform this specific engagement obviates the necessity for the Florida business or person to send his books out of the state to be audited. The benefits of this procedure under our present accountancy law to the business community are obvious. Obtaining a temporary certificate is a simple procedure and presents no great problem.

Under the Supreme Court's decisions and the Board's amended rules relating to certificates by reciprocity, which implement Section 473.19, Florida Statutes, CPA's from other states who meet Florida's educational requirements and become bona fide residents of Florida, may obtain Florida certificates by reciprocity if the applicant already possesses a certificate from another state based on the uniform CPA examination. It is therefore possible for all out-of-state firms who wish to organize a Florida firm, to cause one or more qualified members of that firm to move to Florida and obtain a Florida certificate by reciprocity. Under the recent Supreme Court decisions, a Florida firm so organized, or some other firm already established may accept employment from an out-of-state firm as a client and sell the work product of the Florida firm to the out-of-state firm for use in making master audits of its inter-state clients. Naturally, the Florida firm may not come under the domination or control of the out-of-state firm to the extent that it would create a violation of Section 473.16, i.e. the Florida

firm may not become the representative, agent or manager in Florida of the out-of-state firm.

B. *Position of Florida Institute of CPA's*

In appearances before the Board presenting their views on the matter of inter-state practice, the Florida Institute of Certified Public Accountants takes the position that the present law, as explained above, permits any out-of-state firm to adequately serve its Florida clientele.[3] Under this view, no change in the law would be necessary.

C. *Position of Out-of-State National Firms*

The position of the six out-of-state National firms is that the present procedures are too cumbersome in the light of modern-day accountancy and that they are unable to render to their Florida clients the kind of service that these clients should have. The six out-of-state National firms also take the position that the correspondent relationship is not satisfactory for a number of reasons.[4] They recommend that the law be amended to permit them to either open branch offices in Florida or form subsidiary firms operating under their National names.[5] As to all other out-of-state accounting firms or individuals, they would continue with certain modifications and restrictions the present system of temporary permits.[6]

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[3] Pages 31-34—Exhibit A.

[4] Pages 6-7—Exhibit B.

[5] Page 12—Exhibit B.

[6] Page 13—Exhibit B.

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D. *Comments By Board On The Positions*

In presentations before the Board by the representatives of the six out-of-state National firms and by representatives of the Florida Institute of Certified Public Accountants, many grounds were advanced by each group to support their opposite positions on the matter of inter-state practice. To the majority of the Board, all of the grounds advanced by each party gave the appearance of being well considered and sincere. On most points there did not appear to be irreconcilable differences in their views, yet the chances of agreement on a common course of action or solution to the problem appeared nil.

A majority (four members) of the Board feels that while agreement on all the other matters might be reached, the six out-of-state National firms would not agree to any solution that did not enable them to carry on the practice of public accountancy in the State of Florida under their own names. Furthermore, it appears that the position of the Florida Institute of Certified Public Accountants is equally adamant in its opposition to the practice in the State of Florida by these firms under their National names. While many arguments involving standards of the profession, service to clients, etc., were advanced both persuasively and logically by the two parties, in the Board's view the reason they will never reach agreement is that the economic consequences of their two views are so directly opposed. Stated bluntly, Florida has become a rich market for accounting services to local businesses and the out-of-state National firms want a part of it. The Florida practitioners do not want them to have it.

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E. *Public Interest*

In none of the presentations by the two parties to the Board, or by any other party, was the public interest mentioned except in a passing manner or when trying to support an argument by reference to the public interest concept.[1] Accordingly, as the public interest is the principal reason for regulatory bodies, it became necessary for a majority of the Board to examine the controversy from the public interest viewpoint and ascertain on its own, and as objectively as possible, just how the public interest was affected by the conflicting views.

The first question faced by the Board related to the client need, as distinguished from the desire, of the out-of-state firms to practice in the State of Florida to a degree greater than that presently permitted by law. In their presentations to the Board, the out-of-state National firms emphasized the fact that most of the large business enterprises in Florida were audited by out-of-state firms and that the needs of these businesses for constant and continuing accounting services were great. In Exhibit C, under the heading of "Florida Firms Employing 1,000 or More," are listed the out-of-state firms auditing these Florida firms. An examination of the firms listed indicates that the great majority of these businesses audited by out-of-state accounting firms are not "Florida Firms," but are only branches of out-of-state industrial corporations or subsidiaries of such corporations. In fact, no more than 15 out of the 70 firms listed might be considered as Florida-based firms audited by out-of-state accountants.

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[1] Pages 8-9—Exhibit B, for example.

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The degree of services required by large industrial firms with their own sophisticated auditing and tax departments, other than the annual audit, major tax advice, and occasional specialized management services work, is negligible. It should be noted that auditing the branches of National industrial firms located in Florida rarely consists of more than observation of inventory-taking and confirmations of accounts receivable.

It appears to the Board, therefore, that the Florida business community would not be appreciably benefited by the admission of the out-of-state firms, and that the most that could be said for their admission is that it would provide a convenience for that portion of the Florida business community which employ them. In support of this conclusion, it may be noted that the managing partner of one of the six firms stated to the Sub-committee on Business Regulation of the Governmental Reorganization and Efficiency Committee, that to the best of his knowledge, the presence or absence of any particular accounting firm in Florida had never been a factor in the decision of an industry to locate or not to locate in Florida.

The second question which the Board felt to be of importance to the public was the effect upon the business community of the disappearance of a substantial number of the Florida firms which would follow immediately upon the admission to practice within the State of out-of-state National firms. For many years the number of large and medium independent firms throughout the United States is being reduced by reason of mergers with National firms. In some areas, these mergers have been so widespread as to deprive the local business community of any large independent accounting firm. In these areas, large and medium-

sized businesses are confined to two choices in the selection of their accountants—a National firm or a small local firm which might not have the manpower to adequately serve such business. The Board is unable to answer whether the disappearance of a substantial number of large independent accounting firms in Florida by way of merger with National firms would be in the public interest or not. However, the Board is aware that such concentration of business and the elimination of competitive firms is contrary to the clearly-defined public policy of the United States, and that business mergers and activities which tend to eliminate competition and leave the business community to the mercy of a few is frowned upon.

The third question concerning the majority of the Board relates to the lowering of standards which have evolved for the protection of the public. In presentations before the Board, the six out-of-state National firms very strongly pointed out their high technical abilities and denied that they could possibly contribute to any lowering of standards if they were permitted to practice in the State of Florida. There is no question as to the technical competency of the six out-of-state firms represented, but legal counsel for the Board has advised that legislation which would permit certain firms to operate in Florida because they were large and deny other out-of-state firms the same right because they were not big enough, could not be supported in the courts. If this view is correct, it is obvious that no legislation that would not have universal application to all CPA's should be adopted. A program which would permit *any* out-of-state firm to open a branch office in Florida, staffed by Florida CPA's, would at first glance appear to protect the high standards of Florida by permitting only Florida CPA's to practice here. However, this would be a naive conclusion

because the Florida partners of an out-of-state firm would have their income, their future, and their very livelihood governed by senior partners of the firm located outside of Florida. Clearly, they would be under the complete domination and control by the out-of-state firm. In this view, it is apparent that the out-of-state firm could be composed of CPA's, none of whom could meet the standards of Florida, yet the firm would be permitted to carry on a Florida practice under the umbrella of the Florida CPA.

It is the view of the Board that any procedure involving the use of branch offices or subsidiary partnerships cannot help but lower the standards of the profession in Florida and thus harm the entire State, unless the technical and moral standards of each out-of-state partner of such firm are passed on by the State Board of Accountancy—an obviously impossible administrative task. The adoption of legislation which would permit out-of-state firms—good, bad or indifferent—to open branches in Florida, or create subsidiary partnerships, would have to be with the understanding and belief that while a lowering of the standards of accounting service to the public of Florida would result, other benefits would ensue to the business community and to the public which would outweigh the damages created by lowered standards.

F. *Conclusions and Recommendations*

It appears to the majority of the Board (1) that the Florida business community would not be benefited by modifying the provisions of the present law relating to the practice of accountancy by out-of-state accounting firms in Florida; (2) that the present provisions do not result in any real inconvenience to the clients using out-of-state ac-

counting firms, or to such firms serving Florida clients; and (3) that the modifications suggested by the out-of-state National firms would result in the lowering of the accounting standards in Florida and lessening of the public protection presently afforded by the regulation of accounting by the State.

Accordingly, a majority of the Board recommends to the legislature that it leave unchanged the provisions of the present law in respect to the circumstances and arrangements under which out-of-state accounting firms may render public accounting services in Florida.

The majority of the Board is of the opinion that, while the present system does permit out-of-state firms to adequately serve its clients, certain mechanics can be adopted which would meet valid objections to the present procedure. One of these objections is that under the present law, Florida CPA's who have a correspondent relationship with out-of-state firms are prevented from stating that this relationship exists, on its stationery or other communications to its clients, because this could be considered as violation of the agency or representative prohibition in Section 473.16. The Board does not feel that this prohibition serves any worthwhile purpose and recommends that the law be changed to permit any party to a correspondent relationship to show such relationship on its stationery or otherwise.

The other objection relates to the degree of supervision which the out-of-state firm may exercise over the work performed by Florida correspondent firms. Accounting firms whose name the work of other firms are having to accept more and more responsibility for the second firm's work incorporated in statements put out by it. Under Section 473.16, a violation would probably occur if the out-of-state firm exercised any major control over the Florida firm in the

performance of work by the Florida firm as correspondent for the out-of-state firm. The Board feels it is unfair to require an out-of-state firm to accept a major degree of responsibility for work performed by its correspondent without being able to supervise that work. Accordingly, a majority of the Board recommends that in those cases where the Florida correspondent performs work for an out-of-state firm, on an engagement for which the out-of-state firm has obtained a temporary certificate, the out-of-state firm be permitted to supervise the work of the Florida firm on that particular engagement to the extent that it deems necessary, and that such supervision shall not be deemed to create an agency, representative or managerial relationship as contemplated in Section 473.16. Such supervision will not work to relieve the Florida firm of its responsibility for the maintenance of high standards, nor will it weaken the regulatory control now available to the Board.

III—Problems Related to Administration

Certain changes in the definitions and terminology used in the present law and the incorporation therein of the modifications by Court decisions would make the Accountancy Law more readily understandable, and if an over-all revision of the law is contemplated, such changes and modifications should be included in such revision. They are not numerous and are not important enough in themselves to require separate legislation. The details of the changes recommended by the Board are set forth in Exhibit D, but may be summarized as follows:

473.02—Public Accounting Defined—The Board recommends certain changes in this section which are intended for

the purpose of clarifying definitions used therein and to broaden the scope of public accountancy to reflect the increased responsibilities placed on accountants by various regulatory bodies, court decisions, etc.

473.08—Qualifications of Applicant, etc.—The Board proposes that this section be changed so as to bring the residency section into agreement with the recent decision of the Florida Supreme Court, to eliminate certain expired provisions, and to clarify the meaning of a major in accountancy and certain other terms.

473.19—Certificates Granted to Holders From Other States—The Board recommends that this section be amended so as to bring the residency and experience sections into agreement with the recent decisions of the Florida Supreme Court.

473.26—Each Member of Firm Must Have Certificate, etc.—It is recommended that this section be amended so as to clarify the responsibility for supervision of branch offices.

Respectfully submitted,

/s/ Arthur I. Hemmings
Arthur I. Hemmings, Chairman
State Board of Accountancy

Joined by Members:
Mark W. Eastland, Jr.
James D. A. Holley
Benjamin E. James

A supplementary report will be submitted by Board Member, Charles W. Johnson, Jr.

Appendix D

CHANGES IN CHAPTER 473, FLORIDA ACCOUNTANCY LAW, RECOMMENDED BY BOARD OF ACCOUNTANCY

1. *Section 473.02, Florida Statutes*—It is recommended that certain sub-sections be deleted or amended to read as follows:

Section 473.02 "Public Accounting" Defined.—

(1) Who holds himself out to the public in any manner as one who is skilled in the knowledge, science and practice of public accounting and as qualified to render professional services as a public accountant for compensation; or

(4) Who prepares, signs or certifies for clients, reports of audits, balance sheets and other financial, accounting and related schedules; exhibits, statements, or reports which are supplied to the client or others upon instruction of the client for any purpose, or are to be filed with a court or other tribunal or governmental agency subject to the provisions of Section 473.29, or used for any other purpose; or

Present Section 473.02 (6) should be deleted in its entirety.

2. *Section 473.08, Florida Statutes*—It is recommended that certain sub-sections be deleted or amended to read as follows:

Section 473.08 Qualifications of Applicant for Examination; Certificates to Successful Examinees; Standards.—

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(1) Any person who is a citzen of the United States and a bona fide resident of the State, over the age of twenty-one years, of good moral character, and a graduate of a high school with a four years' course of study, or who has had an equivalent education, and who shall otherwise meet the qualifications specified in the rules of the Board, shall be entitled to take an examination for the purpose of determining whether or not such person shall be permitted to practice in this State as a certified public accountant, provided such person

(a) is a graduate of at least a four-year accredited college or university course, and

(b) at the time of application must have received a degree with a major in accounting or subsequently must have completed such courses which would constitute a major in accounting as defined in (4) (b) of this Section.

(2) A person who qualifies to take said examination pursuant to provisions of paragraph (a) of subsection (1) of this section, and who takes and passes said examination, shall not receive a certificate as a certified public accountant and shall not be permitted to practice public accounting in this State until he shall have completed one year of work in a certified public accountant's or public accountant's office or certified public accountant's office of another state, or shall have met equivalent standards as determined by the Board in other employment, or until he shall have successfully completed an additional accredited one year accounting course at an accredited college or

university, and proof of compliance with the provisions of this paragraph shall be established in such form as is prescribed by the State Board of Accountancy.

(3) For the purpose of this section, a resident of Florida is defined as one who has resided in this State immediately preceding the filing of his application, and who is legally domiciled in this State.

(4) The State Board of Accountancy shall have the authority to establish the standards for determining and shall determine:

(a) what educational institutions offer a four-year accredited college or university course, and

(b) what courses taken at such schools constitute a major in accounting, within the contemplation of this section.

Present Sections 473.08 (1)(b) and (c), and 473.08 (3) and (4) should be deleted in their entirety.

3. *Section 473.19,* Certificates Granted to Holders from Other States.—

The provisions contained in House Bill No. 124, introduced April 7, 1967, are basically acceptable to the Board.

4. *Section 473.26, Florida Statutes*—It is recommended that this section be amended to read as follows:

Section 473.26 Each Member of Firm Must Have Certificate; Management of Office; Practicing Under An Assumed Name; Penalty.—

Appendix D

It shall be unlawful for any person to engage in the practice of public accounting in this State as a member of a firm unless he shall be the holder of a certificate as a public accountant or a certificate as a certified public accountant, issued by the Board. It shall be unlawful for any office of a public accountant or certified public accountant in Florida to be managed by anyone other than a certified public accountant or public accountant, registered as such in Florida, each office shall be staffed on a full time basis by at least one certified public accountant whose primary responsibility shall be the supervision of the business conducted through that office. No person shall practice public accounting in this State under an assumed name, and no certificate as a certified public accountant shall ever be granted to a corporation. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the County jail for not more than six months.

STATEMENT OF ARTHUR I. HEMMINGS, CHAIRMAN OF THE FLORIDA STATE BOARD OF ACCOUNTANCY, BEFORE THE SUBCOMMITTEE ON BUSINESS REGULATION OF THE GOVERNMENTAL REORGANIZATION AND EFFICIENCY COMMITTEE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Since we appeared before this Committee on October 21, 1966, the Supreme Court of Florida has handed down its decisions in the cases of *Mercer* v. *Hemmings* and *Bevis* v. *Bartland*. The effect of the decision in *Mercer* v.

Hemmings is to eliminate the provisions of the Florida Statute requiring two years of residence in Florida as a condition to obtaining a Florida CPA certificate by examination or by reciprocity. Any person who is otherwise qualified for a Florida certificate may take the Florida examination or apply for a certificate by reciprocity upon becoming a bonafide resident of Florida.

In *Bevis* v. *Eastland*, the Court sustained the Board's action denying reciprocal certificates to applicants holding CPA certificates from Pennsylvania, New Jersey, Massachusetts, Missouri, New York and California because those states do not grant "similar privileges" to Florida CPAs. The Court said, however, that "the statute gives the Board wide discretion in the issuance of reciprocal certificates . . . with responsibility to exercise such discretion in a not unreasonable manner."

Exercising the discretion recognized by the Supreme Court, the Board on December 27, 1966, amended its Rule 20-9.04 relating to reciprocal certificates. The amended rule, which became operative on February 24, 1967, substantially liberalizes the provisions for obtaining Florida certificates by reciprocity. In effect, the amended rule provides for issuance of Florida CPA certificates by reciprocity to any person who meets the educational qualifications for a Florida certificate by examination, who has a valid CPA certificate from another state based on the uniform CPA examination and who is a bonafide resident of Florida. Since the operative date of the amended rule, the Board has approved issuance of more than 20 certificates by reciprocity.

In *Mercer* v. *Hemmings*, the Supreme Court again sustained the validity of Section 16 of the Statute and again held that "it is necessary for all partners in Price Water-

house to hold a Florida certificate before the firm can practice as certified public accountants in this state." The Court pointed out, however, that this section of the statute "was certainly not intended to prevent a Florida certified public accountant from making audits within this state under the employment of and for the use of accounting firms in other states in making master audits of clients engaged in interstate commerce."

Under the Supreme Court's decisions and the Board's amended rule relating to certificates by reciprocity, CPAs from other states who meet Florida's educational requirements and become bonafide resident of Florida may obtain Florida certificates by examination or may obtain Florida certificates by reciprocity if the applicant already possesses a certificate from another state based on the uniform CPA examination. It is, therefore, possible for qualified members of all out-of-state firms who wish to organize a Florida firm, to obtain Florida certificates by reciprocity. And under the Supreme Court decision in *Mercer* v. *Hemmings*, a Florida firm so organized or some other Florida firm already established may accept employment from an out-of-state firm as a client and sell the work product of the Florida firm to the out-of-state firm for use in making master audits of its interstate clients.

Still in effect and available are the provisions of Chapter 10 of the Board's Rules which for several years now have recognized and provided for registration of correspondent relationships between out-of-state firms and Florida firms. These Rules seem to afford a practical means by which out-of-state firms may provide a working arrangement for servicing their interstate clients' accounting needs in Florida. Several such correspondent relationships registered with the Board have proved to be workable.

Appendix D

It therefore seems, to a majority of the Board, that the present statute as construed and affected by the decisions of the Supreme Court of Florida and as implemented by the Rules of the Board now in effect provide a practical means by which individual practitioners and members of out-of-state firms who have the educational qualifications for Florida certificates may obtain Florida certificates so that they may practice in this state and a practical means by which out-of-state firms may service the accounting needs of their interstate clients. In this view no legislative changes in the existing statute are necessary for such purposes.

March 16, 1967

APPENDIX E

A LITTLE CLOSED SHOP

It's a cozy little arrangement.

It's also an intolerable conflict of interest.

The director of the State Board of Accountancy, which is supposed to regulate accountants, is also the director of the Florida Institute of Certified Public Accountants, which is the accountants' trade association.

The chairman of the Accountancy Board is on the institute's executive committee.

Both the state and private groups use the same office space.

Six national CPA firms are now trying to gain permission to practice in Florida. This free enterprise is opposed by the Florida Insitute of Accountants, which apparently does not believe in a free market—at least when it comes to selecting an accountant.

The Board of Accountancy, ever since Florida's accountancy law was passed in 1931, has made it more and more difficult for national firms to maintain offices, agents or staffs in Florida—unless all partners of the non-resident firms are Florida CPAs, a totally unrealistic requirement.

AND NOW IT develops that the board which promulgates those regulations is practically inseparable from the group which has a vested interest in stifling competition.

The magnitude of this conflict is so immense that it shocks even those of us who have become pretty well inured to "regulation" as practiced in Florida.

It's hard to fathom why neither the board nor the institute can see no wrong in this arrangement.

WE HOPE THE Florida Legislature will help them by making it absolutely clear that regulatory agencies exist to help the consumer, not the business regulated.

(St. Petersburg Times, March 19, 1967.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

HUGH MILLER MERCER, et al.,
Appellants,
vs.
ARTHUR I. HEMMINGS, et al.,
Appellees.

406
No. _____

HERMAN W. BEVIS, et al.,
Appellants,
vs.
MARK W. EASTLAND, et al.,
Appellees.

No. _____

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

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IN THE

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OCTOBER TERM, 1967.

HUGH MILLER MERCER, et al.,
Appellants,
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ARTHUR L. HEMMINGS, et al.,
Appellees.

HERMAN W. BEVIS, et al.,
Appellants,
vs.) No. _____
MARK W. EASTLAND, et al.,
Appellees.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

The appellees move the Court to dismiss the appeal in each of the above-entitled cases on the ground that it does not present a substantial federal question.

Statement of the Case

The partners of "Price Waterhouse & Co." a "national" firm of certified public accountants holding certificates from States other than Florida, desire to practice in Florida under

their trade name "Price Waterhouse & Co." without each of the partners first obtaining a Florida certificate as required by Section 473.16, Florida Statutes. They propose to carry on this Florida practice under their trade name through the agency of one or more resident CPA's certified by Florida.

Not denying Florida's police power generally to regulate the practice of public accounting and specifically to grant its certificate only to bona fide residents of Florida meeting Florida's high educational standards, appellants contend that the several provisions of the United States Constitution relied on exempt them from fulfilling the requirements of the Florida Statutes, i.e., that each of the individual partners of "Price Waterhouse" is accorded the federal constitutional right to practice public accounting in Florida through the agency of a partner or employee residing in and certificated by Florida and carrying on appellants' business in Florida under the name "Price Waterhouse & Co.".

Until sometime in 1962 "Price Waterhouse" obtained "temporary certificates" from the State Board pursuant to Section 473.14, Florida Statutes. That section authorizes the issuance of "temporary certificates" to CPA's of other States to enable the holders "to fulfill specific engagements or employments, the contracts for which were entered into beyond the limits of the State" and provides that no such temporary certificate shall be valid for more than ninety days or cover more than one employment.

In 1960 the partners of Price Waterhouse & Co. surreptitiously established an office in Miami staffed by a resident manager and several resident assistants, none of whom held Florida CPA certificates. In January of 1962 the partners of Price Waterhouse & Co. established an additional office in Tampa, similarly staffed (Appellants' Appendix A, pp. 28a and 29a).

In June, 1962, appellants Bevis and Rankin, domiciled in New York, and appellant Mercer, domiciled in Atlanta, partners of Price Waterhouse, and Mr. Daly, then full-time manager of the Price Waterhouse Miami office, entered into a partnership agreement and thereafter published notice under the Florida fictitious name statute of their intention to engage in business in Miami, Dade County, Florida, under the name "Price Waterhouse & Co." The partnership agreement recited that "Price Waterhouse & Co.," a co-partnership "with its principal office located in the City of New York," had consented to the use of that name (Exhibits 3 and 4 to Daly's deposition, Exhibit 9).

Appellants Bevis, Rankin and Mercer had no intention of becoming residents of and personally practicing public accounting in Florida; they intended instead that Daly or some other resident partner or agent would carry on the firm business in Florida under the name of "Price Waterhouse & Co."

The State Board became aware of this "situation" in July of 1962 when Mr. Daly applied for a Florida certificate by reciprocity, representing that his continuous employment by Price Waterhouse in Florida "constitutes full time employment with a certified public accountant" for two years "as required under Sections 473.19 and 473.01 of the Florida Accountancy Law" (Appellants' Appendix A, pp. 29a-30a; Exhibit 1 to Daly's deposition, Exhibit 9). The State Board thereafter amended its Rule governing "temporary certificates" (Rule 20-9.03) to make clear that CPA's certified by States other than Florida are not entitled by Section 473.14, Florida Statutes, to receive temporary certificates for the purpose of establishing and maintaining a full-time practice of public accounting in Florida, as distinguished from the purpose of fulfilling specific engagements (Appellants' Appendix B, p. 60a).

The partners of Price Waterhouse & Co. thereupon instituted the action now styled *Mercer v. Hemmings*, contending, among other things, that they could not lawfully

> "... be required to have Florida licenses as certified public accountants in order to maintain offices [in Florida], staffed by full-time employees, in which to perform their accounting services, ..."
>
> Appellants' Appendix A, p. 32a,

and that

> "... the plaintiff partners have had and now have the constitutional and legal right to continue to engage in the occupation and business of accountancy in the State of Florida and the constitutional and legal right to continue to render accounting services in this state to or for any and all corporations, firms and individuals by which or by whom they have been or shall be employed to render such services."
>
> Appellants' Appendix A, p. 34a.

Consistent with the Board's Rule 20-9.03, the Supreme Court of Florida held that such temporary certificates did not accord Price Waterhouse "the privilege of engaging on a year-round basis, through permanent offices staffed by full-time employees residing in this state, in the practice of accountancy, as certified public accountants, in this state" (Opinion of the Supreme Court of Florida, July 29, 1964, Appellants' Appendix A, p. 34a). The Florida Court held that in order to so practice in Florida the Price Waterhouse partners would be obliged to first obtain Florida certificates by examination or by reciprocity.

Notwithstanding the decisions of the Florida courts complained of here, the partners of Price Waterhouse & Co., still

uncertificated by Florida, continue to engage in a year-round practice through their offices in Florida, staffed by full-time residents of Florida.

Question Presented

The question presented, therefore, is not whether Florida may consistently with the Constitution require certified public accountants to be licensed by Florida before practicing public accounting in Florida, nor yet whether Florida's requirements for certification are valid, but

Whether the United States Constitution requires that Florida except from the operation of its laws non-resident public accountants, certified by other States but not by Florida, who desire to practice in Florida under a fictitious trade name through a partnership or other agency relationship with a resident public accountant certified by Florida.

Argument

The "heart" of what appellants choose to call the "restrictive regulatory scheme" is found in Sections 473.16 and 473.23, Florida Statutes (Appellants' Jurisdictional Statement, p. 6). These provisions make it unlawful for a Florida CPA to practice as a representative, agent, manager or partner of anyone not licensed by the State Board.

These same provisions were challenged in *Morgan* v. *Oosterhoudt* (Fla., 1957), 96 So.2d 139, and sustained. Upon appeal to this Court the appeal was "dismissed for want of a substantial federal question." *Oosterhoudt* v. *Morgan*, 355 U. S. 603.

We submit that these appeals should likewise be dismissed for want of a substantial federal question.

It seems undebatable -- and it is not debated by appellants -- that Florida and all other States may constitutionally require local certification as a condition to the practice locally of public accounting.

It seems likewise undebatable that Florida may constitutionally require, as it does, that an applicant for certification be a bona fide resident of Florida at the time of his application. Many of the States have a comparable provision in their laws regulating the practice of public accounting (see "Provisions in Cpa Laws and Regulations," U. S. Government Printing Office: 1963 O-695-254; and C.C.H. Accountancy Law Reporter). Such provisions represent a wholly justifiable exercise of the police power of the several States. Cf. *LaTourette* v. *McMaster*, 248 U.S. 465, in which this Court sustained South Carolina's requirement that an applicant for an insurance broker's license reside two years in the State.

In their simplest application, Sections 473.16 and 473.23, Florida Statutes, prohibit the non-holder of a Florida certificate from practicing public accounting in Florida through the agency or partnership of a Florida CPA either in the name of the non-holder of a Florida certificate or in the name of the Florida CPA or under some fictitious name such as "Price Waterhouse & Co."

Appellants concede that "a few states," in addition to Florida, "require all partners of a firm to be licensed in a state as a prerequisite to practice." Still not directly attacking the provisions of the Statute so requiring, appellants comment that such other States have made the required licenses "readily available to accountants engaged in interstate practice" (Appellants' Jurisdictional Statement, p. 16) and fall back on the general proposition that the State's police power, sufficient to justify regulation of individuals and small firms,

may not impose the same conditions and restrictions on members of a large "national" firm serving "interstate" clients.

Thus, appellants would make an exception for the six "national" firms so as to permit the members of those firms to practice in Florida through the agency of a resident manager or partner (Appellants' Appendix D, p. 100a). Obviously, legislation making such an exception would discriminate against all other CPA firms and against all individual practitioners, residents and non-residents, who would remain subject to the proscriptions of these Sections of the Florida Statutes.

Numerous State court decisions have held invalid legislation purporting to permit members of a partnership to practice under the license of one of its members while requiring all individual practitioners to be licensed to practice. *Mayor, etc., of City of Vicksburg* v. *Mullane* (1913), 106 Miss. 199, 63 So. 412; *Henry* v. *Campbell* (1910), 133 Ga. 882, 67 S.E. 390, 27 L.R.A.(n.s.) 283; *State* v. *Gardner* (1898), 58 Ohio St. 599, 51 N.E. 136, 41 L.R.A. 689; *Winkler* v. *Benzenberg* (1898), 101 Wis. 172, 76 N.W. 345. In the cited cases, the effect of the unlawful discrimination resulting from such legislation was to invalidate the whole licensing scheme. Should this Court hold that a person not holding a Florida certificate may practice accounting in Florida through the agency of or partnership with a Florida CPA, it seems obvious that the power and responsibility of the State Board to enforce Florida's educational and ethical standards would thereby be completely thwarted.

Florida's prohibition against a firm of accountants practicing as such unless all members of the firm are certified by Florida is justified by the findings and conclusions of the State Board as reported to the Florida Legislature:

(1) that the Florida business community would not be benefited by modifying the provisions of the present law relating to the practice of accountancy by out-of-state accounting firms in Florida; (2) that the present provisions do not result in any real inconvenience to the clients using out-of-state accounting firms, or to such firms serving Florida clients; and (3) that the modifications suggested by the out-of-state National firms would result in the lowering of the accounting standards in Florida and lessening of the public protection presently afforded by the regulation of accounting by the State."

Appellants' Appendix D, pp. 105a-106a.

The 1967 Florida Legislature considered the State Board's report and the recommendation of the six "national" firms that they be exempted from the requirements of Section 473.16, Florida Statutes, and decided to continue to limit the practice of accounting to firms in which all members are certified by the State of Florida. This policy decision of the Florida Legislature is within the police power of the State and "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation" for "courts do not substitute their social or economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U. S. 726, 729-730; *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U. S. 35, 47.

Appellants' managing partner testified that he favors "Federal accreditation" (Exhibit 14, p. 23, and Exhibit 13, p. 4). Consistent with this tenet, appellants assert that "the practice of accountancy . . . is national in scope and cannot be fragmented" (Appellants' Jurisdictional Statement, p. 16) and that "National accounting firms such as Price Waterhouse

must operate across state boundaries" (Id., p. 17) and conclude that Florida's "exclusionary regulation" (Id., p. 27) amounts to a "balkanization of the profession" (Id., p. 17) that cannot be "tolerated in our federal regime" (Id., p. 27).

These arguments would be better addressed to the national Congress. Should the Congress provide for federal licensing of certified public accountants serving "interstate clients," it is clear that Florida could not require Florida certification as a condition to practicing in Florida under the federal license. *Sperry* v. *Florida*, 373 U.S. 379. However, until Congress acts in such a way, the States must be free under their police power to regulate the local practice of accountancy in the manner that, in their judgment, best serves the public interest.

Conclusion

The appeals should be dismissed for want of a substantial federal question.

Respectfully submitted,

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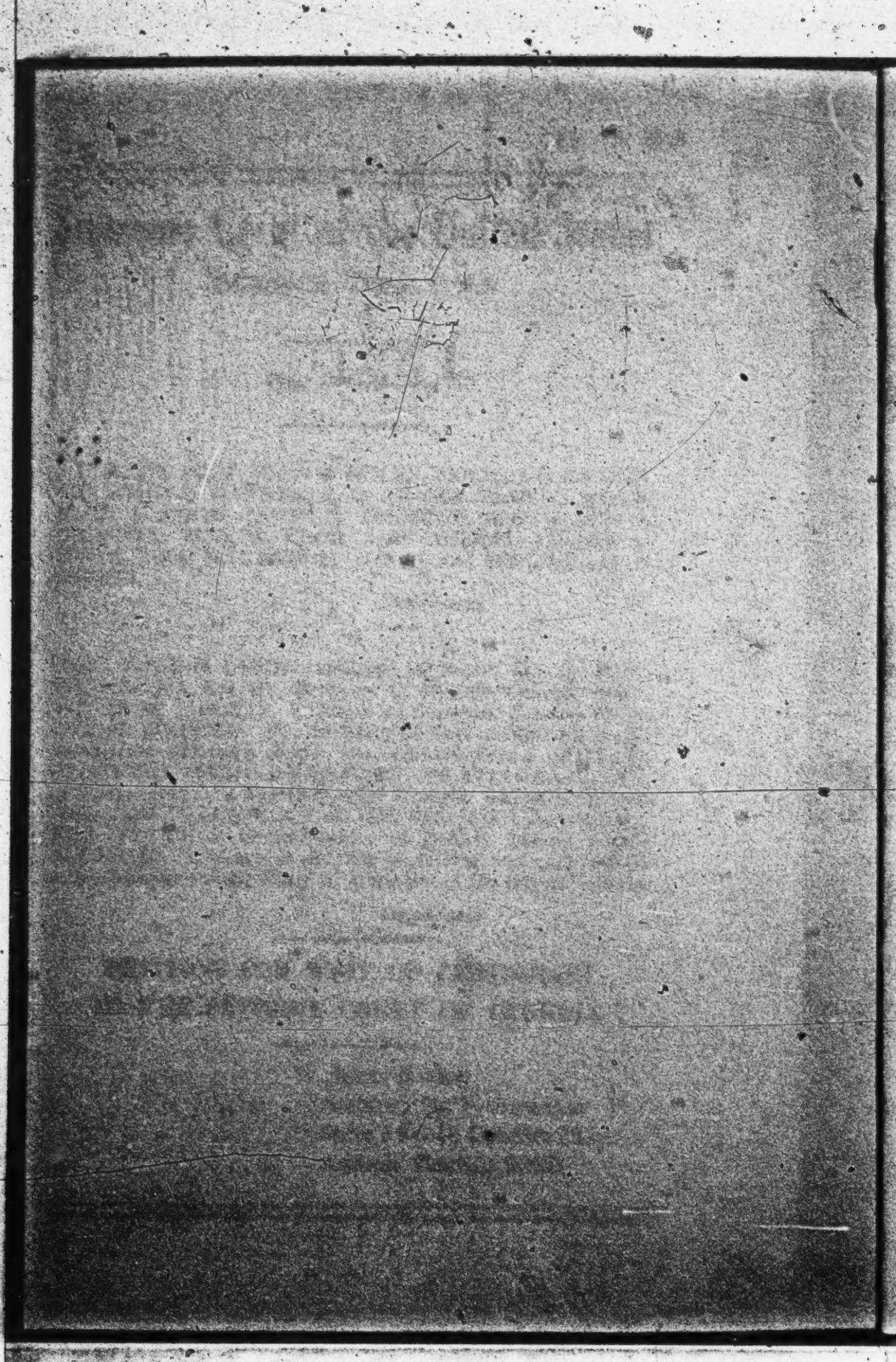

SUPREME COURT, U. S. No. 365
SEP 11 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, ET AL.,
Appellants,

—against—

ARTHUR I. HEMMINGS, ET AL.,
Appellees.

HERMAN W. BEVIS, ET AL.,
Appellants,

—against—

MARK W. EASTLAND, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA
BRIEF OPPOSING MOTION TO DISMISS

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September 11, 1967.

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In the

Supreme Court of the United States

October Term, 1967

Hugh Miller Muench, *et al.*,
Appellants,

—*against*—

Arthur I. Hemmings, *et al.*,
Appellees.

Herman W. Bevis, *et al.*,
Appellants,

—*against*—

Mark W. Eastland, *et al.*,
Appellees.

No. 405

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OPPOSING MOTION TO DISMISS

The most significant feature of the Board's Motion to Dismiss is its recognition by silence of the accuracy of appellants' central contentions that (a) the statutory scheme as construed and applied excludes Free Thinkers from Florida and will prevent it from ever [illegible] the work required by its Legislative Reapportionment Act through supervision and control of the [illegible] certified nominations [illegible] power [illegible] for the [illegible]

the true purpose of that scheme is simply economic protectionism.

Instead, the Motion seeks to divert attention from those fundamental concessions by distortion of the facts and by argument relying on inapplicable authorities.

1. *Facts.* The Motion to Dismiss seeks to convey an impression that there are six national accounting firms which seek a special exemption only for themselves from Chapter 473, Florida Statutes, that they have sneaked "surreptitiously" into Florida, and are somehow endangering the Florida public. That is simply not the case.

This litigation is of interest and importance to the entire interstate accounting profession. When the Board in 1962 sealed off the last avenue open to any meaningful form of Florida practice by all but the three "grandfathered" firms, it was Price Waterhouse, having the necessary resources and endurance, which took the lead in instituting litigation. Thereafter, it and five other national firms with substantial client activity in Florida joined in seeking a legislative remedy that would have benefited not merely them but all firms engaged in interstate practice. (That remedy, for example, would have permitted a medium-sized Atlanta firm to serve its Georgia clients with operations in Florida through a resident Florida-certified partner.)* In addition,

* The Board's statement (p. 9) that "the six" national firms sought to be exempted" from F. S. 473.16, and that the 1967 Florida Legislature "considered" their proposal and "decided" to reject it is just not so. There are other national firms besides the [illegible] interest in legislation in Tallahassee; the proposed [illegible] would have benefited [illegible] and would have benefited [illegible] with practices extending [illegible] Florida, and the 1967 Florida Legislature did not consider the proposal [illegible] was rejected out of hand by the House Committee [illegible] Senate Judiciary Committee on a vote of the [illegible] Florida Institute of Certified Public Accountants [illegible]

the other national and smaller interstate firms are also concerned about, and vitally interested in, the questions raised in this litigation.*

Equally concerned, we assume, will be the Securities and Exchange Commission once appellants are excluded, in view of the prohibitions contained in F. S. 473.16 (emphasized by the implementing Chapter 20-10 of the Board Rules) against effective control and supervision of a Florida representative or correspondent, which make it impossible to comply with "generally accepted auditing standards."**

---

*Witness the action taken late in 1965 by the American Institute of Certified Public Accountants, over the objection of members from a few southern states, appointing an investigating committee made up of practitioners not associated with national firms who were instructed to lend their good offices in an effort to resolve the unique "Florida situation." This committee interviewed the members of the Florida Board and representatives of the Florida Institute and ultimately reported that it saw no way out of the deadlock. It concluded its report thus:

> "It would appear, therefore, that until there is more sentiment among Florida CPAs favoring adoption of the attitude of the other 52 jurisdictions toward interstate practice, there will continue to be an unresolved problem as to how an out-of-state firm can effectively conduct a public accounting practice of any volume within the State of Florida." REPORT OF SPECIAL COMMITTEE ON "FLORIDA SITUATION" TO MEMBERS OF COUNCIL OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, May, 1966 (unpublished).

**Rule 2-02 of SEC Regulation S-X requires that financial statements be prepared in accordance with those standards. 17 C.F.R. § 210.2-02(b). The current compilation and definition of generally accepted auditing standards is contained in the American Institute of Certified Public Accountants' Auditing Standards and Procedures. The affected auditing standards, as set forth in that document, are as follows:

> "310 Before he authorizes the issuance of another accountant's opinion [illegible] the principal auditor should make such inquiries or adopt such procedures as, in his judgment, are appropriate in the circumstances to satisfy himself as to the professional reputation of the other auditor. He should also [illegible] whether the other auditor is aware of the relationship of his activities with those of the other independent auditor to achieve a proper coverage of the ongoing examination

Nor have appellants acted "surreptitiously" in Florida. Their practice in that state since 1906 is a matter of record and has never been criticized nor said to have harmed the Florida public. But when confronted after the War with a growing demand for services in Florida and a statute that conditioned permanent certification on the mass movement of all partners to Florida and two years' apprenticeship there for each, they naturally sought ways of mitigating the apparent impact of Chapter 473. One was through ten years of futile negotiation with the Board (Ex. 10, p. 81). Another was the formation of a subsidiary partnership made up of the senior partner, financial partner, and Atlanta partner of the parent firm and the resident manager in Miami who was not then qualified for membership in the parent firm.

Such a subsidiary partnership arrangement has been used in a few other jurisdictions, but the Board's Motion (p. 3) seems to attach pejorative significance to its creation and even implies that it has continued in existence and been an important part of this litigation. In fact, it never came fully into existence, because the final step under F. S. 865.09 of filing in the circuit court was not taken. More important, it never came into operation because, as the Board was informed prior to suit, it was awaiting the approval of the Board.*

---

* solicitation of the financial statements, such as arrangements for continuing the company's distribution of intercompany transactions, elimination of intercompany profits, etc. In some cases he may need to make investigations to, or make particular audit tests, the other independent auditor. Despite the fact that the other independent auditor remains responsible for the performance of his own work and for his opinion, and the principal auditor assumes no responsibility in this connection [illegible] Paragraph 34 of S. [illegible] CAP[illegible]

[illegible] Manuscript of [illegible] pp. 18-19.

Accordingly, appellants were forced to continue reliance on temporary certificates to cover their expanding volume of work in Florida, utilizing resident managers and staff. (The Board responded by adopting Rule 20-9.03 and threatening to withhold temporary certificates, the subject for this litigation.) Appellants made no attempt, in professional circles, to hide the existence of their Florida work spaces; indeed, those work spaces were called to the Board's attention no later than June 6, 1962 by Mr. Daly's application for a reciprocal certificate, as the Board's Motion (p. 3) appears to recognize. The only thing "surreptitious" about their activities was their rigorous effort to insulate themselves from the Florida public (Jurisdictional Statement, at 8). At the time, the leading interpretation of Chapter 473 was contained in *Florida Accountants Association v. Dandelake*, 98 So. 2d 323 (Fla. 1957), suggesting that the accountancy law was essentially a "holding out" statute designed to protect the Florida public from misrepresentation. As a result, appellants went to exceptional pains to avoid any appearance of holding themselves out as fully licensed in Florida, and the circuit court in its first decree in *Mercer v. Hemmings* entered no contrary finding on that score (App. A, p. 43a).

On the first appeal, the Supreme Court of Florida held that Chapter 473 regulated as well the actual practice of certified public accountants in Florida and therefore was applicable to appellants even if they did not hold themselves out (App. A, pp. 33a-34a). At that same time, however, by striking down the apprenticeship requirements (and at that point seemingly the residence requirement), the court appeared to offer one law alternative to abandonment of appellants' practice in Florida, namely, [illegible] all the partners under Chapter 473. Since the Board and the court below in *Davis v. Eastfield* have now eliminated [illegible]

off that route as well, appellants' only recourse is constitutional adjudication in this Court. They have thus gone to remarkable lengths to find some sort of workable accommodation under Florida's regulatory scheme and, in the process, to test its constitutionality in every possible application.*

2. *Argument.* The basic fallacy in the Board's abbreviated argument stems from its unwillingness to distinguish between an attack on a single provision of a statute in isolation and an attack on the application of a statute as a whole. Even the court below, as far back as the first opinion in

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*The Board has also injected for the first time elliptical references to appellants' "trade name" (p. 2), going so far as to assert that the question presented is whether appellants are entitled to an exemption enabling them to practice in Florida "under a fictitious trade name" (p. 5). In fact, appellants are the living American successors of the original London partnership of Samuel Lowell Price, William Hopkins Holyland, and Edwin Waterhouse, formed in 1865. After Holyland's retirement, the firm name was changed nine years later to Price, Waterhouse & Co. *See* DICKINSON, PRICE, WATERHOUSE & Co. IN AMERICA 1, 5 (1951).

Moreover, appellants are not seeking to introduce their name into the state through some sort of nefarious scheme as the Board implies; rather, as shown overwhelmingly by this record, they seek to perform the necessary accounting *work* for their interstate clients with operations in Florida. This they cannot do, says the court below, nor can they even supervise the work of local Florida accountants who might act in their behalf, says Chapter 20-10 of the Board Rules (App. A, pp. 62a-66a)—obviously directed at a great deal more than the mere use of a firm name.

Concluding its Statement of the Case (pp. 4-5), the Board declares that, despite the decisions below, appellants, "still uncertificated by Florida, continue to engage in a year-round practice through their offices in Florida, staffed by full-time residents of Florida." In fact, appellants have never operated in violation of law or contrary to any order. They have been able to continue their peculiar form of practice in Florida only by virtue of judicial stays and, when the stays were about to expire, by virtue of assurances given to Mr. [illegible] in April, 1967, in connection with appellants' applications, that the status quo would not be altered during the pendency of this appeal.

Mercer v. *Hemmings*, recognized that appellants were challenging the "Act, as a whole" (App. A, p. 39a).

In line with its refusal to recognize this distinction, the Board points on the one hand to cases such as *LaTourette* v. *McMaster*, 248 U. S. 465, that have sustained isolated residence requirements, and on the other to the few states with counterparts to F. S. 473.16 requiring certification of all partners. But it ignores the fact that not a single one of those statutes couples a residence requirement with a provision comparable to F. S. 473.16 and that instead each offers a less restrictive alternative, *e.g.*, a resident partner arrangement, the liberal grant of reciprocal certificates to all partners, or certification of a subsidiary partnership.

It is thus noteworthy that the Board has devoted not a word to the companion appeal, *Bevis* v. *Eastland*, in which appellants took the final step ostensibly open to them under the statute by seeking mass certification of all partners under F. S. 473.19, and in which they were peremptorily rejected. In short, as a result of fully litigating these two cases, appellants have shown that there are simply no remaining openings in Florida's regulatory scheme—notwithstanding those openings exist, in one form or another, in all the other states and in the Model Bill adopted by nineteen states.

The failure to grasp the nature of appellants' constitutional challenge also explains the Board's continued reliance (p. 5) on *Morgan* v. *Oosterhoudt*, 96 So. 2d 139 (Fla. 1957), *appeal dismissed*, 355 U. S. 603, where Chapter 473 was not attacked nor tested as a whole (but only F. S. 473.16 and the related penalty provision, F. S. 473.23). Furthermore, the case was fully disposed of on the pleadings alone by summary judgment; there was no allegation and no showing of a client need that could not be satisfied by occasional temporary certificates or of an attempt to seek per-

manent certification by any of the plaintiff's nonresident prospective partners (the members of Peat, Marwick, Mitchell & Co.). Indeed, the plaintiff's argument in the state courts was based on statutory construction and he did not even pursue an attack on constitutional grounds (other than an alternative argument based on his freedom of contract) except for two conclusional sentences inserted in a petition for rehearing filed in the Florida Supreme Court after the adverse decision on appeal. *See* Appendix to Jurisdictional Statement, No. 623, October Term, 1957, at 11a-12a; Appellees' Motion to Dismiss, at 6-8.

Of the same cast is the Board's reliance on an alleged form of discrimination that is envisioned in the event Chapter 473 is struck down. The discrimination involved in the rather ancient plumbers' cases cited by the Board (p. 7) had to do with resident craftsmen, the court refusing in each case to favor resident *firms* at the expense of resident *individuals*. That is quite different from the actual discrimination now sanctioned by Chapter 473 in requiring all of the Price Waterhouse partners around the world to give up their practice elsewhere and move to Florida, when each of them is certified by one or more States and they are perfectly willing to submit a resident general partner—who would meet all of the present-day Florida perequisites for certification—to the jurisdiction of the state and of the Board. The professional conduct of such a partner, of course, would be binding upon his nonresident partners, affording full protection to the Florida public. It is difficult to understand, therefore, what "seems obvious to the Board" (p. 7), namely, "that the power and the responsibility of the State Board to enforce Florida's educational and ethical standards would thereby be completely thwarted." Presumably at least some of the other forty-nine states are interested in enforcing their own educational and ethical standards, yet the

Board points to no evidence that these states have been "thwarted" by their assimilation of partners of national and other interstate firms.

Finally, the Board suggests (p. 9) that appellants' arguments would be better addressed to the Congress, citing *Sperry* v. *Florida*, 373 U. S. 379 (noted, Jurisdictional Statement, at 26). Suffice it to say that, in addition to the supremacy clause, it has been the historic function of this Court to enforce just as vigorously the commerce clause and the fourteenth amendment. *See, e.g.*, Givens, *The Commerce Clause and the Interdependent Economy*, 53 A. B. A. J. 719, 720 (1967).

As we have pointed out, the most significant feature of the Motion to Dismiss is what it does not say. It silently concedes that Price Waterhouse is to be excluded from Florida and will no longer be able to perform in Florida, or even supervise, the work required by its interstate clients. The silence on this subject, on its quasi-judical proceedings in *Bevis* v. *Eastland*, and on any arguable police power justification for the exclusionary scheme, is perhaps representative of the Board's cavalier attitude throughout the litigation. The Board has overlooked what has been a basic postulate of English constitutional history—later incorporated in some of the underlying notions of our own due process clause—ever since the College of Physicians refused to license Dr. Bonham and then imprisoned him for his unlawful practice of medicine: "No man shall be a judge in his own cause." *Bonham's Case*, 8 Co. Rep. 107a, 118a (1610). In any event, it is hard to perceive how even this self-interested Board can deny that the challenge to Chapter 473 on these appeals presents a substantial federal question.

CONCLUSION

The Motion to Dismiss should be denied and this Court should note probable jurisdiction of the questions presented.

Respectfully submitted,

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September 11, 1967.

SUPREME COURT, U. S. No. 406
NOV 17 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, *et al.*,
Appellants,

—against—

ARTHUR I. HEMMINGS, *et al.*,
Appellees.

HERMAN W. BEVIS, *et al.*,
Appellants,

—against—

MARK W. EASTLAND, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

PETITION FOR REHEARING

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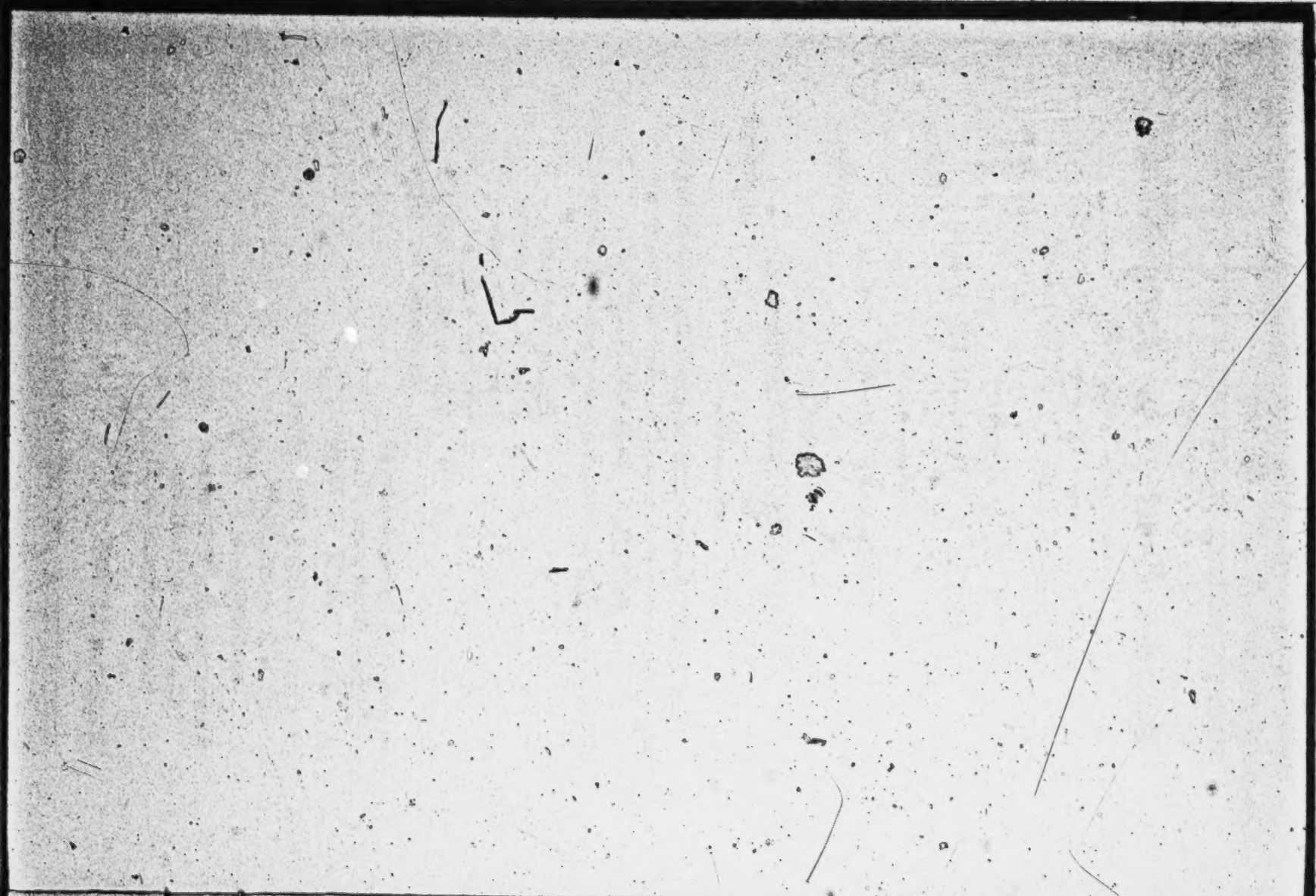
November 17, 1967.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, *et al.*,
Appellants,
—*against*—
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Appellees.

HERMAN W. BEVIS, *et al.*,
Appellants,
—*against*—
MARK W. EASTLAND, *et al.*,
Appellees.

No. 406

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

PETITION FOR REHEARING

Appellants pray that the Court grant rehearing of its decision of October 23, 1967, granting appellees' motion to dismiss and dismissing the appeals for want of a substantial federal question, and that the Court note probable jurisdiction and assign the cases for oral argument for the reasons set forth below and in the Jurisdictional Statement. Alternatively, appellants pray that the Court invite the Solicitor General to express the views of the Securities and Exchange Commission.

Argument

Appellants' Jurisdictional Statement, in stressing the commerce clause and other constitutional issues in these cases, may not have sufficiently emphasized the immediate and damaging impact of the decisions below. Moreover, our emphasis on appellants' private claims may have obscured the injury which the decisions below will cause in the public sector, by reducing the quality of financial reporting for interstate companies and hence impairing the protection of investors. We are submitting this petition because that injury is a matter of substantial concern not only to the accounting profession in general but also to the broader business and financial community, as we believe will be underscored by supporting *amici* presentations which will be offered to this Court. We also assume that the Securities and Exchange Commission will likewise be concerned with the impact on its regulatory activities and accounting policies.

1. The decisions below operate effectively to prevent Price Waterhouse (as well as other interstate accounting firms) from serving its interstate clients' auditing needs in Florida because:

(a) the Price Waterhouse firm cannot practice on a permanent basis in Florida since

(i) its over 150 partners cannot all obtain permanent Florida licenses because they cannot all meet Florida's residence requirements; and

(ii) Florida law also prohibits a resident Price Waterhouse partner fully licensed by the Florida Board and subject to its discipline from acting as the firm's representative, agent or manager within the state. F.S. 473.16, F.S. 473.23;

(b) the Price Waterhouse firm can no longer obtain temporary licenses to practice in Florida since

(i) under the rules of the Florida Board of Accountancy such licenses will not be granted to Price Waterhouse if it maintains a full time Florida office with a resident staff, even if the work of that office is devoted entirely to servicing interstate clients who have retained Price Waterhouse to audit their national operations; and

(ii) it is completely impractical for Price Waterhouse to serve the audit and related needs of its more than 100 such interstate clients, who by the nature of their substantial operations require year-round attention in Florida, except by utilizing full-time resident staff and offices with appropriate facilities and records. Temporary incursions into the state on a transient basis, whatever their former practicality for a few clients with minor Florida operations, have not sufficed for many years.

2. The exclusion of Price Waterhouse from the state is not theoretical. It is imminent. Perhaps this Court has inferred that some sort of administrative accommodation with the Board is possible, inasmuch as appellants have been able to maintain full-time offices in the state for several years during the pendency of the litigation. However, the fact is that the trial court's decree contained an injunction restraining appellants "from rendering accounting services in the State of Florida of the kind and nature that have heretofore been rendered" by them (Appendix to Jurisdictional Statement 44a-45a, 47a) and that such injunction was merely stayed while the litigation proceeded. On Octo-

ber 24, 1967, the very next day after this Court dismissed these appeals, the Board moved to vacate that stay.*

3. Appellants will thus shortly be relegated to the "purchase" of auditing services from Florida-certified accountants (Appendix to Jurisdictional Statement 15a). As "purchasers" they will of course be prohibited from exercising control or supervision of the local Florida accountant in the performance of the work even though that may be necessary in order to ensure its quality and completeness. That prohibition is emphasized by F. S. 473.16, which prevents a Florida-certified public accountant from acting as the "representative, agent or manager" of a nonresident firm. It is further emphasized and implemented by Board Rule 20-10.03, which establishes criteria aimed at insuring the total independence (and insularity) of the local accountant vis-à-vis the nonresident firm.**

4. The inability of Price Waterhouse as a "purchaser" to supervise or control the work will have a seriously deleterious effect on financial reporting for the large publicly held national companies which are its clients. Both the managements of such companies and their investors insist that audit work be done by interstate firms such as Price Waterhouse because (1) they have confidence in such firms' high standards of competence and independence and (2) only such firms, with experienced and well established operating staffs and facilities in many states, can effectively perform an integrated audit of the entire corporate enter-

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* The hearing on that motion has been adjourned until December 19, 1967, upon appellants' representation that they intended to file this petition for certiorari.

** The full text of that Rule, which condemns any exercise of "control" over the "professional practice of the Florida correspondent" [illegible] is set out in the Appendix to Jurisdictional Statement. See also related Rules 20-10.01 and 20-10.02, *id.* at 62a-63a.

prise. If a firm such as Price Waterhouse cannot perform the substantial audit work required for the Florida operations of its clients, but must rely on the unsupervised work of others, a fundamental doubt will be raised as to its ability to take responsibility for a client's financial statements in so far as they involve Florida activities. Indeed, if the Florida activities were to comprise a substantial enough portion of the total, there would be doubt as to whether the auditor could express an unqualified opinion as to the financial statements at all.

Such doubts as to auditing responsibility are inherently antithetical to the accounting policies contained in SEC Regulation S-X. *See especially*, Rules 2-02(b) and 2-05, 17 C. F. R. §§ 210.2-02(b), 210.2-05 (1964), appellants' brief opposing motion to dismiss at 3 note**. If there is any doubt about what we say on this score, we respectfully suggest that the Court invite the Solicitor General to express the views of the SEC.

This fragmentation in audit responsibility which results from Florida's restrictive scheme is, in our view, the most basic issue on this appeal. A multistate corporation operating in Florida and in any other states which may follow its parochial lead would be required to have as many separate audits as there were such states, and no one firm of auditors could possibly take responsibility for an overall audit. The auditor's opinions available to investors would be fragmentary, uncoordinated and totally ineffectual in conveying an overall unified expression of opinion as to the financial results of the corporate operations as a whole.

We submit that this fragmentation—real and potential—is substantial in its federal implications and presents questions which deserve a full hearing on the merits. Such fragmentation is wholly at odds with the salutary and expanding emphasis on consistency in application of accounting principles and centralization of responsibility for the audit function; only through such consistency and centrali-

zation can the investing public meaningfully evaluate the financial reports of various multistate businesses and be assured that the accountants who audit those reports will be held to the highest standards of professional competence and responsibility.

Conclusion

For all of the foregoing reasons, appellants respectfully pray that the Court grant rehearing, note probable jurisdiction, and direct a hearing on the merits. In the alternative, appellants respectfully request that the Court invite the Solicitor General to express the views of the Securities and Exchange Commission.

November 17, 1967

Respectfully submitted,

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Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

BRUCE BROMLEY
Counsel for Appellants

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MEDORE, ET AL., *Appellants*

v.

ARTHUR I. HEMMINGER, ET AL., *Appellees*

HERMAN W. BEVIS, ET AL., *Appellants*

v.

MARK W. EASTLAND, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

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Of Counsel:

PHILIP B. SCARBOROUGH,
COVINGTON & BURLING.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 406

HUGH MILLER MERCER, ET AL., *Appellants*

v.

ARTHUR I. HEMMINGS, ET AL., *Appellees*

HERMAN W. BEVIS, ET AL., *Appellants*

v.

MARK W. EASTLAND, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Movant, the American Institute of Certified Public Accountants, Inc. (hereinafter the "Institute"), has secured the consent of Appellants and has sought but not yet been granted the consent of Appellees to allow the filing of a brief in support of Appellants' petition for rehearing. Accordingly, the Institute asks that this Court exercise its discretion under Rule 42(1) to permit the Institute to file the attached *amicus* brief so that its views may be presented in these cases.

Interest of Amicus Curiae

Only certified public accountants of the United States, licensed as such by the state, are eligible for membership in the Institute, and almost two-thirds of

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Interest of Amicus Curiae

Only certified public accountants of the United States, licensed as such by the state, are eligible for membership in the Institute, and almost two-thirds of

them, some 60,000, are members of the organization. In the field of professional accounting, it is the counterpart of the American Bar Association in the law and the American Medical Association in medicine. As such the Institute is deeply involved in the formulation of professional ethics, the development of high standards of technical performance, the preparation of uniform examinations used throughout the United States to test the competence of those who seek admission into the profession, and similar matters. The Institute has also devoted considerable attention to the issue presented by the present cases—the relationship of various methods of state regulation of the practice of accounting to the ability of CPA firms to serve their clients in interstate commerce effectively and economically. Indeed, the governing body of the Institute has adopted the following objective for the organization:

> "It is an objective of the Institute to bring about uniform national standards applicable to the requirements for issuance of CPA certificates and recognition of qualified accountants of other countries, *freedom of movement in interstate and international accounting practice,* and codes of ethics and enforcement procedures." (Emphasis supplied.) (Adopted May 1962)

AICPA, *Code of Professional Ethics and By-Laws* 34 (1967).

Thus, the Institute's interest in the present litigation derives both from its unique position as national spokesman for the profession and from its continuing concern with the issues raised by this case. This interest, it is submitted, should be sufficient to sustain the Institute's position as amicus curiae in the present cases.

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v.

MARK W. EASTLAND, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

An amicus brief in support of a petition for rehearing is not the place for a detailed discussion of the issues of law raised by the decision below. Those issues have been identified and discussed by the parties in their prior submissions to this Court. The only purpose of this brief is to submit the Institute's view of the importance of the questions for which review is sought.

Florida's injunction against Price, Waterhouse & Co raises serious problems which require this Court' resolution. Like every state, Florida has a legitimat concern about the quality of professional services pro vided in the state, be they legal, medical, or accounting But also involved in these appeals are important ques tions concerning the flow of interstate commerce; th interests of investors; and the interstate character o practice in the accounting profession, which is neces sarily different from that of law or medicine. Ther may be implications for international trade and invest ment as well.

This is not the place to argue these questions. W simply urge that the questions are so important tha they should be resolved one way or the other by thi Court.

The Institute has long recognized the legitimacy o state regulation of the accounting profession. We urge however, that there are issues in these cases relatin to national commerce and to the professional practic of accounting throughout the country which are highl relevant in the analysis of the constitutional question involved in the present appeals, and we draw to th Court's attention that the Florida Supreme Court di not even advert to these broader issues in reachin its decision.

We fear that the decision below, if allowed to stan as not raising a substantial federal question, may b interpreted as holding these broader issues irrelevan to the administration of state statutes regulating th practice of accounting. The result may be wide-sprea and sustained uncertainty and confusion, as well a substantial adverse economic effects.

We therefore urge the Court to grant Appellants' petition for rehearing, to note probable jurisdiction, and to hear argument on the merits in order to provide a full and fair opportunity for all interests to be explored in the resolution of this difficult matter.

Respectfully submitted,

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Of Counsel:

PHILIP R. STANSBURY
COVINGTON & BURLING

In the

Supreme Court of the United States

October Term, 1967

No. 406

Hugh Miller Mercer, *et al.*,

Appellants,

—against—

Arthur I. Hemmings, *et al.*,

Appellees.

Herman W. Bevis, *et al.*,

Appellants,

—against—

Mark W. Eastland, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF W. R. GRACE & CO. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

W. R. Grace & Co. hereby respectfully moves for leave to file a brief *amicus curiae* in support of appellants' petition for rehearing in this case. The consent of the attorneys for appellants has been obtained. The consent of the attorney for appellees was requested, but had not been obtained at the time the motion and brief were printed.

W. R. Grace & Co. is interested in the instant appeals because its audit work is performed by Price Waterhouse

& Co., appellants herein, and because it and its subsidiaries engage in extensive business activities in Florida, among other states. Grace, therefore, has a substantial interest in seeing that Price Waterhouse is able to conduct such audit work in Florida as is necessary to ensure that it is able to express an unqualified opinion with respect to Grace's financial statements.

This motion is made by W. R. Grace & Co. so that it may emphasize to the Court the damaging effect which the decisions below will have on financial reporting practices of W. R. Grace & Co. and other companies similarly situated.

Respectfully submitted,

LEO A. LARKIN
Attorney for W. R. Grace & Co.,
Amicus Curiae

November 17, 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 406

HUGH MILLER MERCER, *et al.*,

Appellants,

—against—

ARTHUR I. HEMMINGS, *et al.*,

Appellees.

HERMAN W. BEVIS, *et al.*,

Appellants,

—against—

MARK W. EASTLAND, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF W. R. GRACE & CO., *AMICUS CURIAE*

This brief is respectfully submitted by W. R. Grace & Co. in support of its request that this Court grant rehearing of its decision of October 23, 1967, granting appellees' motion to dismiss, note probable jurisdiction of the appeals, and assign the case for oral argument on the merits.

Argument

W. R. Grace & Co. is a Connecticut corporation. It is engaged directly and through subsidiaries in the manufacture, production, processing and distribution of chemicals, foods and other products throughout the United States and in most parts of the free world, and in the operation of steamships in the trade between the United States and Central and South America. Its securities are publicly held, and at present there are more than 45,000 holders of its common stock. Its common stock and debentures are listed on the New York Stock Exchange, Midwest Stock Exchange and other regional exchanges. In recent years Grace's consolidated sales and revenues have been in excess of $1,000,000,000. The operations of Grace are conducted directly and through approximately 250 subsidiaries.

W. R. Grace & Co. and its subsidiaries have substantial operations in Florida including the mining of phosphate rock and the manufacture of concentrated phosphates and other fertilizers, polystyrene and polyesters. It also operates a research nursery for seeds of various types and has several sales offices, warehouses and other distribution facilities. Its sales in Florida in 1966 were approximately $30,000,000.

As a publicly held company, Grace is required by various federal and state laws, including the laws administered by the Securities and Exchange Commission, as well as by the demands of the market place, to retain a firm of independent public accountants to audit its financial statements to insure that those statements fairly present the financial position of the Company and its consolidated subsidiaries and the results of their operations in accordance with generally accepted accounting principles applied on a consistent basis. To fill this need, Grace has for many years

retained the firm of Price Waterhouse & Co., which it regards as a firm of broad experience and unsurpassed standards of performance.

In order properly to service the present audit needs of a company with Grace's far-flung interests, it is desirable that Price Waterhouse maintain regular offices and facilities throughout the United States and in other parts of the world whose personnel are familiar with Grace's local operations and hence can participate effectively under the overall supervision of the New York office in periodic and special examinations of the financial statements of Grace and its subsidiaries. In Grace's view it would be inadvisable from an audit standpoint for Price Waterhouse to contract out to others any substantial segment of the auditing work in other states. Irrespective of the qualifications of such other auditors, it is desirable that in an audit of financial statements as complex as those of Grace, Price Waterhouse have complete authority and direct participation in the handling of such work, so that the audit work is conducted as an integrated whole and that unqualified opinions in respect of the financial statements may be expressed by Price Waterhouse & Co. Lending institutions and other investors, who are the sources of Grace's heavy demands for capital, frequently request such opinions from a recognized national firm such as Price Waterhouse & Co.

Price Waterhouse's ability to fulfill the accounting needs of Grace and the demands of its investors will be hindered by the decisions of the Florida state courts in the above appeals. Such a prospect, even as to a single state, is disturbing and if other states, encouraged by the Florida rulings, were to adopt and enforce similar exclusionary policies, the auditing problems occasioned by the exclusion of Price Waterhouse and other national firms might affect the ability of Grace to obtain satisfactory opinions from

independent public accountants in respect of its financial statements. Such a situation might also affect practices in respect of the financing of large publicly held corporations such as Grace.

CONCLUSION

For the above reasons, W. R. Grace & Co. respectfully requests that this Court grant rehearing, note probable jurisdiction, and assign the cases for oral argument.

Respectfully submitted,

LEO A. LARKIN
Attorney for W. R. Grace & Co.,
Amicus Curiae

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF EQUITABLE SECURITIES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF, AMICUS CURIAE

MARVIN SCHWARTZ,
Attorney for Equitable Securities Corporation,
48 Wall Street,
New York, N. Y. 10005.

November 17, 1967.

IN THE

Supreme Court of the United States

October Term, 1967

No. 406

HUGH MILLER MERCER, *et al.*,

Appellants,

—against—

ARTHUR I. HEMMINGS, *et al.*,

Appellees.

HERMAN W. BEVIS, *et al.*,

Appellants,

—against—

MARK W. EASTLAND, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Equitable Securities Corporation hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the attorneys for appellants has been obtained. The consent of the attorneys for appellees had not been received at the time of printing hereof.

The interest of Equitable Securities Corporation in this case arises from the fact that it is a substantial under-

writer of securities and a dealer-broker for trading in securities. It is, consequently, vitally interested in averting any impediments to clear and reliable financial reporting by companies that issue securities.

Equitable Securities Corporation makes this motion because it wishes to apprise this Court of the potential adverse impact of the decisions below upon the underwriting of securities and the protection of investors.

November 17, 1967.

Respectfully submitted,

MARVIN SCHWARTZ,
Attorney for Equitable Securities Corporation.

IN THE

Supreme Court of the United States

October Term, 1967

No. 406

HUGH MILLER MERCER, *et al.*,

Appellants,

—against—

ARTHUR I. HEMMINGS, *et al.*,

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HERMAN W. BEVIS, *et al.*,

Appellants,

—against—

MARK W. EASTLAND, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF EQUITABLE SECURITIES CORPORATION, AMICUS CURIAE

Equitable Securities Corporation hereby requests this Court to grant rehearing of its decision of October 23, 1967, granting appellees' motion to dismiss and dismissing the appeal for want of a substantial Federal question, and to note probable jurisdiction and assign the cases for oral argument.

ARGUMENT

Equitable Securities Corporation (hereinafter Equitable) is a securities underwriter and distributor with headquarters in Nashville, Tennessee, and offices in New York City, Philadelphia, Boston, Hartford and eight large Southern and Southwestern cities. Equitable is currently the second-largest brokerage firm in the nation in terms of capitalization, and it is a major underwriter of new issues of securities as well as a major securities broker and dealer. It is a member of the Investment Bankers' Association of America, the National Association of Securities Dealers, the National Security Traders Association and the Midwest Stock Exchange. By the very nature of its business, Equitable is vitally concerned with the adequacy and clarity of financial reporting by companies which issue securities.

The decisions of the Florida courts in the instant appeal may lead to a serious impairment of the financial information furnished investors in the form of audited financial statements of multi-state companies with Florida operations. The Florida statutes and regulations with respect to the practice of accountancy, as interpreted by the Florida courts, require that the auditing work for many such companies must now be divided between the accounting firm auditing such companies' operations in many other states and a firm of Florida accountants. If the out of state firm cannot supervise the Florida work, as seems to be implicit from the Florida decisions, serious questions arise as to its ability to assume responsibility for such work in expressing an opinion as to the financial statements of the whole multi-state enterprise. For many reasons, particularly the requirements of the Securities Act of 1933 and

the responsibilities of underwriters under that Act, such an opinion is essential for the successful marketing of securities and the protection of investors.

What is even more disturbing is the potential impact of the decisions below upon other state agencies regulating the practice of accountancy. If those decisions are not overturned by this Court, there may well be a movement in other states to create similar restrictions which, taken together, would totally fragment the audit work for interstate companies. Such dispersion of responsibility in financial reporting would lead to results contrary to the protection of investors and the national public interest.

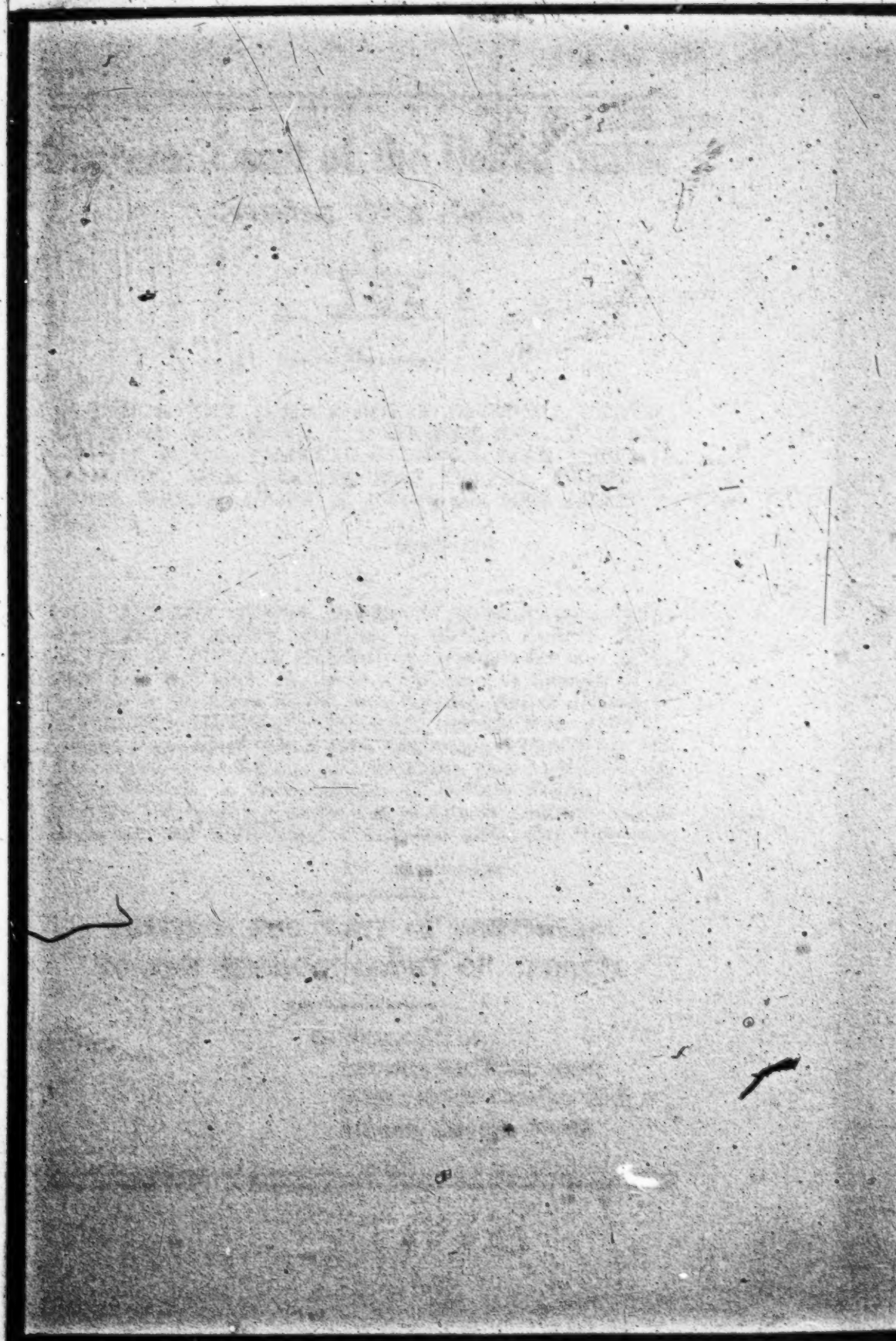
CONCLUSION

For the above reasons, Equitable Securities Corporation respectfully urges this Court to grant rehearing, to note probable jurisdiction, and to assign the cases for oral argument.

November 17, 1967.

Respectfully submitted,

MARVIN SCHWARTZ,
Attorney for Equitable Securities Corporation,
48 Wall Street,
New York, N. Y. 10005.



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No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, et al.,
Appellants,

—against—

ARTHUR I. HEMMINGS, et al.,
Appellees.

HERMAN W. BEVIS, et al.,
Appellants,

—against—

MARK W. EASTLAND, et al.,
Appellees.

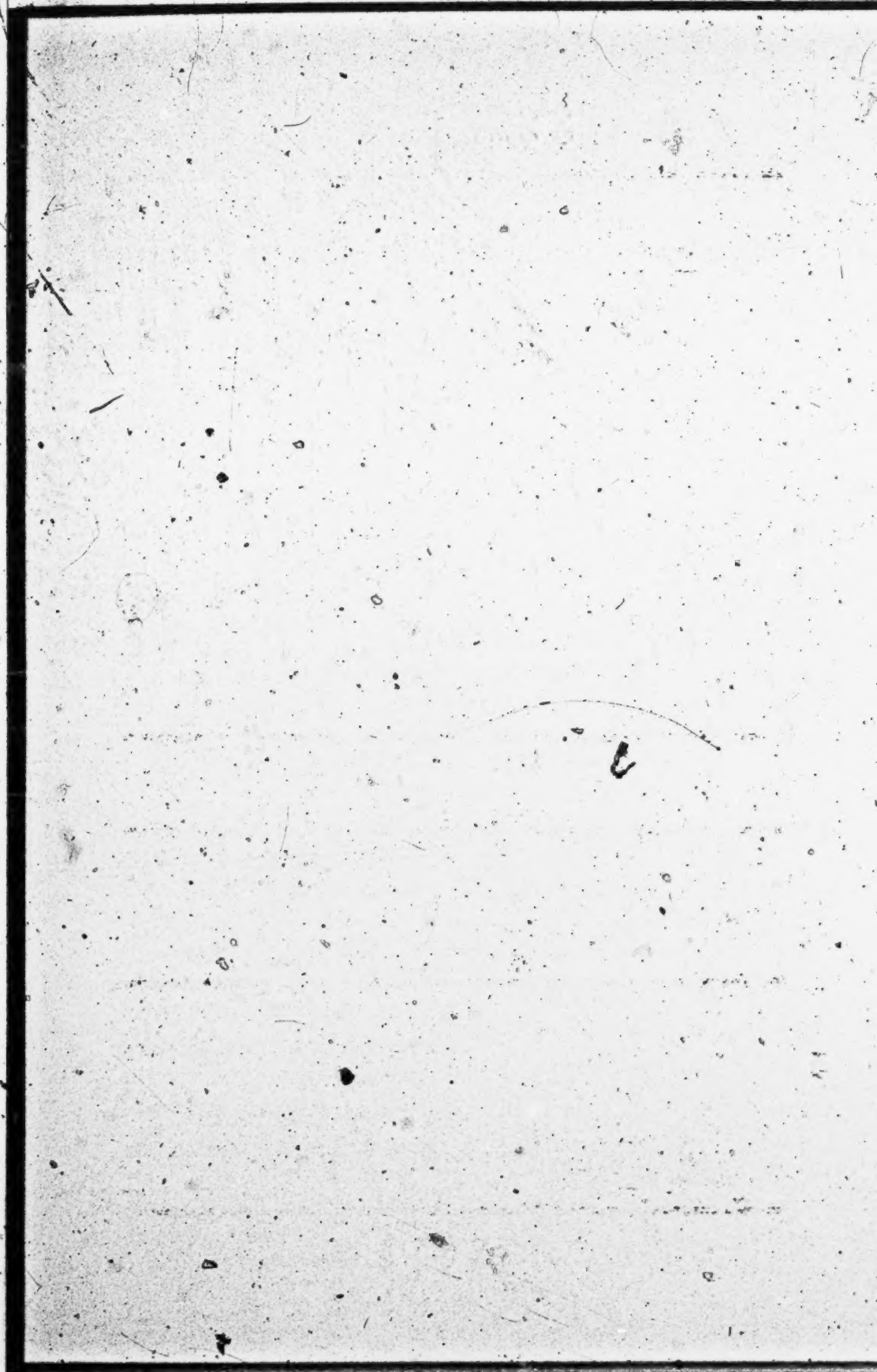
ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF HOWARD JOHNSON COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND BRIEF, AMICUS CURIAE

JOHN T. NOONAN, *Attorney for Howard Johnson Company, Amicus Curiae*

294 Washington Street,
Boston, Massachusetts 02108

November 17, 1967.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, et al.,
Appellants,
—against—
ARTHUR I. HEMMINGS, et al.,
Appellees.

No. 406

HERMAN W. BEVIS, et al.,
Appellants,
—against—
MARK W. EASTLAND, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF HOWARD JOHNSON COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

JOHN T. NOONAN, *Attorney for Howard Johnson Company, Amicus Curiae.*

294 Washington Street
Boston, Massachusetts 02108

Howard Johnson Company hereby respectfully moves for leave to file a brief *amicus curiae* in support of appellants' petition for rehearing in this case. The consent of the attorneys for appellants has been obtained. The consent of the attorney for appellees has been requested but his consent had not been received at the time these papers went to press.

The interest of Howard Johnson Company is that it is a client of the independent public accounting firm of Price Waterhouse & Co., whose partners are appellants herein. The Company through its subsidiaries operates in many states, including Florida. The Company's Florida facilities form a substantial part of its overall operations. The Company believes it essential that its independent auditors have free and continuous access to corporate records in Florida so that they may be able to express an unqualified opinion on the Company's consolidated financial statements.

Howard Johnson Company makes this motion so that the Court may be fully informed, in considering appellants' petition for rehearing, of the interest of substantial multi-state concerns such as the Company in the maintenance of the highest possible standards in financial reporting, and of the Company's deep concern that the decisions of the Supreme Court of Florida may substantially impair the quality of such reporting.

Respectfully submitted,

JOHN T. NOONAN
Attorney for Howard Johnson Company

November 17, 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, et al.,
Appellants,
—against—
ARTHUR I. HEMMINGS, et al.,
Appellees.

HERMAN W. BEVIS, et al.,
Appellants,
—against—
MARK W. EASTLAND, et al.,
Appellees.

No. 406

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF HOWARD JOHNSON COMPANY, AMICUS CURIAE

This brief is submitted by Howard Johnson Company as *amicus curiae* in support of appellants' petition for rehearing of this Court's decision of October 23, 1967, granting appellees' motion to dismiss and dismissing the appeal for want of a substantial federal question.

Argument.

The Howard Johnson Company and its subsidiaries are engaged primarily in the operation and licensing of restaurants and motor lodges throughout the United States. A majority of the parent company's common stock is publicly owned and at present the Company has over 11,000 stockholders. The Company's consolidated gross revenues were in excess of $200,000,000 for the year 1966.

Subsidiaries of the Howard Johnson Company conduct substantial operations in the State of Florida. One of the most important subsidiaries is incorporated in the State of Florida and has its headquarters in Miami. At June 30, 1967, there were 86 Howard Johnson restaurants located in the State of Florida, of which 84 were operated directly while the remaining two were licensed operations. There were also 55 Howard Johnson's Motor Lodges in the State of Florida, of which 10 were directly operated while the remaining 45 were licensed operations. In addition to the above, various commissary facilities are located in Florida for supplying food and other items to both direct and licensed restaurant operations in that state and other states located in the southeast portion of the United States. As is readily apparent from the above, a substantial portion of the business of the Howard Johnson Company and its subsidiaries is conducted in the State of Florida, and a substantial portion of the Company's consolidated gross revenue is derived from those operations.

The Company has retained the Price Waterhouse firm for many years as its independent auditors. The Price Waterhouse firm has offices and facilities throughout the entire interstate area in which the Company has its principal operations. That firm is able through its various offices efficiently to conduct an overall audit of the entire corporate activities of the Company and its subsidiaries, wherever located. Such audit work culminates in an opinion

from the Price Waterhouse firm covering the financial results of operations of the entire Company. Management regards such an overall opinion by its auditors as essential not only for its own internal purposes but for presentation to stockholders and other investors and essential to comply with Federal securities laws.

The Company regards with great alarm any local regulation that would impair the ability of the Price Waterhouse firm to perform in Florida whatever work it may believe necessary to ensure audit results of the highest quality and to enable it to express an unqualified opinion with respect to the Company's financial statements. Such is the effect of the decisions of the Florida Supreme Court, which obviously make it impossible for the Price Waterhouse firm to maintain offices in Florida with qualified staff, facilities and records.

The decisions of the Florida Supreme Court seem to assume that the clients of Price Waterhouse would find it satisfactory for the firm to "purchase" the services of Florida accountants for use in the overall interstate audit. The Company would find it entirely unsatisfactory. The Florida Court's theory assumes an independent contractor relationship between two accounting firms, rather than the desired relationship in which Price Waterhouse as the firm performing the entire audit supervises and controls the nature, extent and quality of the work performed and thus can be held directly responsible for the entire work to the Company and its shareholders.

The Company is particularly concerned lest Price Waterhouse's inability to supervise and control the work would make it impossible for that firm to express an unqualified opinion as to the results of Florida operations. It would be entirely unsatisfactory for the Company to obtain an opinion from Price Waterhouse with respect to the Company's non-Florida operations and a separate opinion from

a Florida firm with respect to Florida operations. It is essential that the financial results of the Company's operations be presented and certified as an integrated whole.

Conclusion.

For the above reason, Howard Johnson Company respectfully requests that this Court grant rehearing, note probable jurisdiction, and assign the cases for oral argument.

Respectfully submitted,

JOHN T. NOONAN
Attorney for Howard Johnson Company

November 17, 1967

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No. 466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, *et al.*,
Appellants,

against

ARTHUR I. HEMMINGS, *et. al.*,
Appellees.

HERMAN W. BEVIS, *et. al.*,
Appellants,

against

MARK W. EASTLAND, *et. al.*,
Appellees.

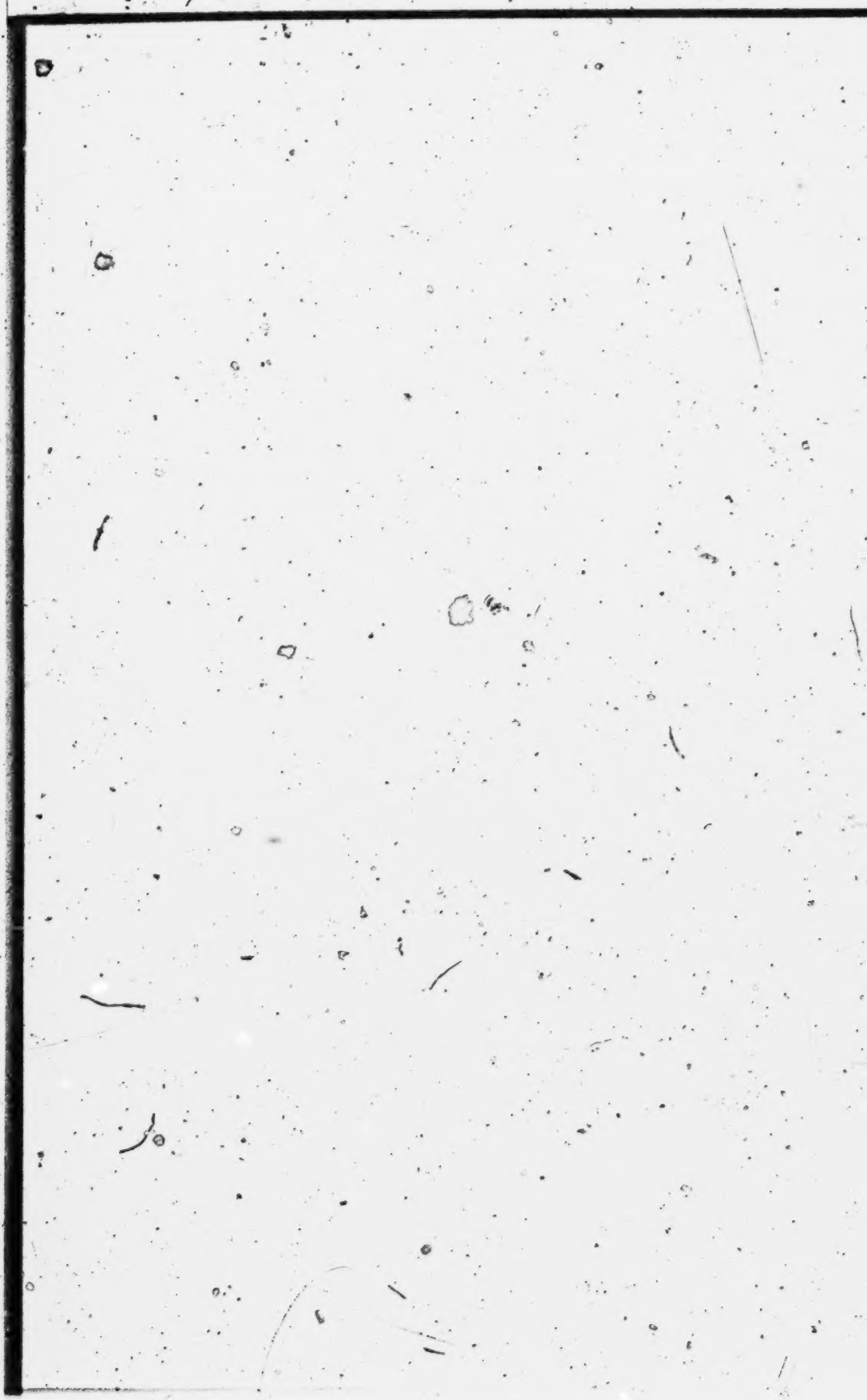
ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF GENERAL FOODS CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

ROBERT MACCRATE,
Counsel for General Foods Corporation,
48 Wall Street,
New York, N. Y. 10005.

MICHAEL M. MANEY,
SULLIVAN & CROMWELL,
Of Counsel.

November 20, 1967.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, *et. al.*,

Appellants,

against

ARTHUR I. HEMMINGS, *et. al.*,

Appellees.

HERMAN W. BEVIS, *et. al.*,

Appellants,

against

MARK W. EASTLAND, *et. al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

General Foods Corporation hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the attorneys for appellants has been obtained. The consent of the attorneys for appellees has been refused.

The interest of General Foods Corporation in this case arises from the fact that it is a client of Price Waterhouse & Co., which performs auditing functions for General Foods Corporation on a national basis. General Foods Corporation has substantial operations in the State of Florida, including a coffee processing plant in Jackson-

ville, and a plant in Winterhaven for the processing of frozen food products. In addition, General Foods maintains distribution facilities and sales offices in Florida. These Florida operations are included in the accounting services performed by Price Waterhouse & Co. for General Foods Corporation.

This motion is made by General Foods Corporation in order to apprise this Court of the potential adverse effect which the decisions of the Florida courts in these appeals may have upon clients of Price Waterhouse and upon their investors and creditors.

November 20, 1967.

Respectfully submitted,

ROBERT MACCRATE,
Counsel for General Foods Corporation, Amicus Curiae,
48 Wall Street,
New York, New York 10005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, *et. al.*,
Appellants,

against

ARTHUR I. HEMMINGS, *et. al.*,
Appellees.

HERMAN W. BEVIS, *et. al.*,
Appellants,

against

MARK W. EASTLAND, *et. al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF GENERAL FOODS CORPORATION, AMICUS CURIAE

General Foods Corporation hereby requests this Court to grant rehearing of its decision of October 23, 1967, granting appellees' motion to dismiss and dismissing the appeal for want of a substantial Federal question, and to note probable jurisdiction and set the cases for oral argument.

ARGUMENT

General Foods Corporation is one of the world's leading manufacturers of packaged food and grocery products. It manufactures and markets a broad range of products under various name brands, including Maxwell House and Yuban coffee and Sanka decaffeinated coffee, Jell-O des-

serts, Kool-Aid, Twist and Tang beverages, Post Toasties, Raisin Bran, Grape-Nuts, 40% Bran Flakes and other cereals, frozen foods under the Birds Eye label, pet foods under the Gaines label, and sundry other products including Log Cabin syrups, Minute Rice, Good Seasons Salad Dressings, and Baker's, Swans Down and Calumet brands baking ingredients. For the last few years, General Foods has had annual consolidated net sales in excess of $1.5 billion.

Approximately 3% of the United States sales by General Foods are attributable to the State of Florida, where General Foods maintains a distribution center and sales offices. In addition, its Maxwell House Division has a coffee processing plant in Florida, and its Birds Eye Division has a plant in Florida for processing frozen Florida orange juice and other frozen foods products.

This Company has for a number of years retained the firm of Price Waterhouse & Co. as its independent auditors. This selection has been influenced not only by the Company's high regard for that firm's competence and professional standards, but also because of that firm's ability to perform auditing and accounting functions wherever General Foods Corporation is operating. In addition, members of the investment community to which General Foods Corporation looks for capital have expressed confidence in General Foods financial statements and reports certified by the recognized national firm of Price Waterhouse & Co.

The American Institute of Certified Public Accountants has sought to establish national standards to govern the practice of public accounting. Agencies of the Federal Government have supported these efforts to establish national standards as important to the public interest, and each State may police the standards imposed by that State upon licensed auditors and accountants; but the States' regulation of auditors and accountants should not unreasonably interfere with the conduct of commerce among the States.

By its decisions in these cases, the Florida Supreme Court has ruled that General Foods Corporation may not retain the accountants of its choice to perform accounting services for this Company in the State of Florida. If those decisions are left standing, other States may follow Florida's lead; that may ultimately result in a situation where a national company, such as General Foods Corporation, will be required to retain separate accountants in each State in which it does business, none of whom would be in a position to express an unqualified opinion concerning the overall financial condition and results of operations for General Foods Corporation.

A State should not be permitted unreasonably to withhold licenses from fully qualified auditors and accountants. A national corporation should be free to choose any qualified firm of accountants to perform auditing and accounting functions for that company, and the Respondents in these cases have offered no logical reason why that choice should be denied to companies which operate in Florida.

CONCLUSION

For the foregoing reasons, General Foods Corporation respectfully urges this Court to grant rehearing, to note probable jurisdiction, and to set these cases for oral argument.

November 20, 1967.

Respectfully submitted,

ROBERT MACCRATE,
Counsel for General Foods Corporation, Amicus Curiae,
48 Wall Street,
New York, N. Y. 10005.

MICHAEL M. MANEY,
SULLIVAN & CROMWELL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

MERCER ET AL. *v.* HEMMINGS ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 406. Decided October 23, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted and the case assigned for oral argument.